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Fiduciary Litigation in Louisiana: Mandataries, Succession Representatives, and Trustees

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Fiduciary Litigation in Louisiana: Mandataries, Succession Representatives, and Trustees

*Elizabeth R. Carter**

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INTRODUCTION

Fiduciaries sometimes behave badly. Misconduct might be innocuous, or it might result in the theft of someone's entire life savings. Fiduciary misconduct appears to be a booming business thanks, in part, to an aging population. The elderly are particularly susceptible to financial abuse, including abuse resulting from fiduciary misconduct. As America's aging population continues to grow, attorneys can expect to see an increase in the number of cases of fiduciary misconduct.

Louisiana, like many states, has taken important steps to help protect vulnerable populations. Yet many gaps remain. Moreover, Louisiana lacks comprehensive guidance for practitioners and courts who deal with cases of fiduciary misconduct. This Article attempts to fill a small part of that gap with respect to three fiduciaries in the estate-planning setting: (1) the mandatary, also known as agent, power of attorney, or attorney-in-fact; (2) the succession representative, also known as the executor or the administrator; and (3) the trustee.

The Article proceeds as follows. Part I provides a general overview of fiduciary responsibility and some of the important distinctions between the common law and civil law traditions. Parts II, III, and IV each address a particular fiduciary relationship in Louisiana and the related litigation issues. Part II addresses mandataries; Part III addresses succession representatives; and Part IV addresses trustees.

I. FIDUCIARY RESPONSIBILITY IN GENERAL

Both common law and civil law jurisdictions impose a particularly high standard of care on a person who is in a position of trust or authority

with respect to another person or his property. This notion is often referred to as a fiduciary relationship. The legal regulation of that relationship, however, differs in important ways between the civil law tradition and the common law tradition. Although an exhaustive history and description of these distinctions is beyond the scope of this Article, some background will be helpful in understanding the challenges and nuances of fiduciary responsibility in Louisiana.

The theoretical underpinnings of fiduciary relationships differ in the two systems: “The common law draws the regulation of fiduciaries mainly from property law, while in the civil law it is based on contract.”¹ Lawyers familiar with the difficulty of importing trust law into Louisiana should readily see the importance of this distinction. Traditionally, the fiduciary relationship at common law stemmed from a bifurcation of ownership between the “legal” owner of the property and the “equitable” owner of the property.² Many of the principles regulating fiduciary relationships are rooted in that division of ownership, a division that is generally inconsistent with civilian property concepts.³ Civil law recognizes fiduciary relationships under the umbrella of obligations. Specifically, all obligors are bound to act in good faith.⁴ Particular obligations have more onerous standards of performance and result in greater liability for the obligor. The distinctions between common law and civil law can be subtle and are sometimes difficult to differentiate.⁵ The two systems often lead to similar conclusions. The distinctions do, however, have significant consequences in some circumstances. They are also important in understanding the role—and liability—of fiduciaries in Louisiana.

A. Fiduciaries in the Common Law Tradition

The term “fiduciary” is usually associated with the common law tradition. Yet both the term and the concept have civil law roots. Those civil law roots evolved considerably in the common law system, leading to significant distinctions between the two legal systems in the modern era.

1. Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 QUEEN’S L.J. 391, 394 (2014).

2. *Id.*

3. *See id.* at 399.

4. *See* LA. CIV. CODE art. 1759 (2018).

5. *E.g.*, Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303, 303–04 (1999) (discussing debate among common law scholars regarding whether fiduciary relationships are based on contract).

1. Development of the Body of Law

The term “fiduciary” is usually traced to two Roman law institutions: the *fideicommissum* and *fiducia*. The “*fideicommissum* was primarily a succession tool by which property was transmitted to one person (the *fiduciarius*) to then be transmitted to another (the *fideicommissus*).”⁶ The *fiducia* “provided a mechanism by which property could be conveyed to another while at the same time providing what was to be done with the thing conveyed.”⁷ Both the *fideicommissum* and the *fiducia* bore some resemblance to the common law trust because they both placed one party in a position of power or authority over property belonging to another.⁸

These Roman legal notions were adopted and adapted by the Catholic Church for its own purposes.⁹ In the Church’s hands, the *fideicommissus* evolved into the *utilitas ecclesiae* that, in turn, evolved into the common law “uses.”¹⁰ Legal development continued under the guidance of the Church by way of its jurisdiction over probate matters.¹¹ Jurisdiction over uses eventually moved to the Court of Chancery, and trusts eventually replaced uses.¹² In the Court of Chancery, the term “trust” evolved into a distinct legal concept, and other trust-like fiduciary relationships were described and regulated by analogy.¹³ Today, the body of law known as fiduciary relationships is usually associated with the common law system and, in particular, with the law of trusts. Modern cases continue to define fiduciary responsibility in a variety of contexts by reference to its trust law origins.¹⁴

6. Ronald J. Scalise, Jr., *Some Fundamentals of Trusts: Ownership or Equity in Louisiana?*, 92 TUL. L. REV. 53, 63 (2017); John Minor Wisdom, *Trust Code in the Civil Law, Based on the Restatements and Uniform Acts: The Louisiana Trusts Estates Act*, 13 TUL. L. REV. 70, 71–73 (1938).

7. Scalise, *supra* note 6, at 65 (internal quotation omitted).

8. *See id.*

9. *See* Myron T. Steele, *The Moral Underpinnings of Delaware’s Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 3, 8 (2012).

10. *Id.* at 8–9. Uses may have had other sources, too. *See, e.g.*, David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011 (2011).

11. Steele, *supra* note 9, at 11–12.

12. Seipp, *supra* note 10, at 1024–25.

13. *E.g.*, L.S. Sealy, *Fiduciary Relationships*, 20 CAMBRIDGE L.J. 69, 71 (1962); Jerry M. Markham, *Fiduciary Duties Under the Commodity Exchange Act*, 68 NOTRE DAME L. REV. 199, 210 (1992); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 DUKE L.J. 879, 880 (1988).

14. *See, e.g.*, Schock v. Nash, 732 A.2d 217, 225 (Del. 1999) (“The common law fiduciary relationship created by a durable power of attorney is like the relationship created by a trust. The fiduciary duty principles of trust law must,

2. Contemporary Fiduciary Relationships

Common law recognizes innumerable fiduciary relationships. Fiduciary relationships may arise by operation of law or by the particular facts of a case.¹⁵ A fiduciary relationship exists “as a matter of law from certain specified relationships.”¹⁶ Relationships that are deemed fiduciary as a matter of law include the attorney–client relationship,¹⁷ the relationship between an attorney-in-fact or agent and a principal,¹⁸ the trustee–beneficiary relationship,¹⁹ and the relationship between the executor or administrator and the estate.²⁰ Civil law likewise imposes fiduciary-like standards on these relationships but continues to do so under the umbrella of the law of obligations. Breach of a fiduciary duty in common law, in contrast, is generally considered a tort action.²¹

A fiduciary relationship in common law may also “exist as a matter of fact in such instances when there is ‘confidence reposed on one side, and the resulting superiority and influence on the other.’”²² Whether a fiduciary relationship exists due to the facts “often turn[s] on questions of fact related to exertion of influence, whether a party trusted and relied on another party, and whether the reliance was justified.”²³ Civil law, in contrast, does not generally recognize fiduciary relationships that arise as a matter of fact.²⁴

therefore, be applied to the relationship between a principal and her attorney-in-fact.”); Steele, *supra* note 9, at 15 (describing how “[a]gency law originated from uses and trusts,” as well as the general origins of trusts).

15. See, e.g., *Azure Dolphin, LLC v. Barton*, 821 S.E.2d 711, 726 (N.C. 2018); *Gibson v. Williams*, 186 So. 3d 836, 851 (Miss. 2016).

16. *Gibson*, 186 So. 3d at 851.

17. E.g., *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 220 (Tex. 2019); *Gibson*, 186 So. 3d at 851.

18. E.g., *Lingo v. Lingo*, 3 A.3d 241, 244 (Del. 2010); *Archbold v. Reifenrath*, 744 N.W.2d 701, 706–07 (Neb. 2008).

19. E.g., *Sykes v. Health Network Sols., Inc.*, 828 S.E.2d 467, 476 (N.C. 2019); *Bombardier*, 572 S.W.3d at 220; *In re Estate of Carter*, 912 So. 2d 138, 145 (Miss. 2005).

20. E.g., *St. Bernard Sch. of Montville, Inc. v. Bank of Am.*, 95 A.3d 1063, 1077 (Conn. 2014); *In re Estate of Carter*, 912 So. 2d at 145.

21. See, e.g., *LCL, LLC v. Falen*, 422 P.3d 1166, 1171 (Kan. 2018); *Alliant Bank v. Four Star Invs., Inc.* 244 So. 3d 896, 914 (Ala. 2017).

22. *Azure Dolphin, LLC v. Barton*, 821 S.E.2d 711, 725 (N.C. 2018).

23. *Gibson v. Williams*, 186 So. 3d 836, 852 (Miss. 2016).

24. E.g., *Lucky v. Carr*, 264 So. 3d 693, 696 (La. Ct. App. 2d Cir. 2019) (noting that a fiduciary relationship could not exist in the absence of an underlying contract of mandate).

Two primary duties are the defining features of the common law fiduciary relationship: the duty of care—or prudence—and the duty of loyalty.²⁵ A third duty of good faith and fair dealing is also an important component of fiduciary relationships.²⁶ Some courts describe this third duty in a manner that suggests it is part of the duty of care or the duty of loyalty;²⁷ others suggest that it is a stand-alone duty.²⁸

Generally, the duty of care refers to the fiduciary's responsibility to act with a degree of skill and caution.²⁹ This duty dictates how a fiduciary should act with respect to any property that is under his control. For example, the duty of care or prudence requires a trustee to “administer the trust as a prudent person would” and to “exercise reasonable care, skill, and caution in doing so.”³⁰ Related subsidiary duties flow from the overarching duty of care and depend on the specific type of fiduciary relationship. For example, trustees have various safeguarding and earmarking duties with respect to trust property.³¹ Trustees are obligated to collect the trust property, to earmark it as trust property, and to segregate it from other property under their care.³² The duty of care also governs how a fiduciary should invest and manage any property under his administration. Depending on the type of fiduciary relationship, the duty of care, or prudence, may prevent a fiduciary from investing in speculative or risky ventures.³³

25. *E.g.*, *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 932 (Pa. 2017); *Forbes v. Forbes*, 341 P.3d 1041, 1051 (Wyo. 2015).

26. *E.g.*, *In re Estate of Ross*, 131 A.3d 158, 167 (R.I. 2016); *In re Sky Harbor Hotel Props., LLC*, 443 P.3d 21 (Ariz. 2019).

27. *E.g.*, *Acorn v. Moncecchi*, 386 P.3d 739, 760–61 (Wy. 2016) (describing the same conduct as breaching the duty of good faith and loyalty); *Tucker v. Brown*, 150 P.2d 604, 620 (Wash. 1944) (describing the duty of loyalty as requiring “that a trustee must act with the most scrupulous good faith.”).

28. *E.g.*, *In re Sky Harbor Props.*, 443 P.3d at 23 (“Thus, the nature of the fiduciary relationship for agents includes a duty of loyalty, a duty of good faith, and a duty of care.”); *F.D.I.C. v. Myers*, 955 F.2d 348, 350 (5th Cir. 1992) (suggesting that fiduciary duty is different from duty of good faith and fair dealing).

29. GEORGE G. BOGERT & GEORGE T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 541 (2d ed. 1977).

30. *Id.*

31. *See id.* § 596.

32. *See id.* §§ 541, 596.

33. *See, e.g.*, *Buder v. Sartore*, 774 P.2d 1383, 1386 (Col. 1989) (en banc) (custodian of children's funds breached fiduciary duty in investing in highly speculative penny stocks); *Carlson v. Wells*, 705 S.E.2d 101, 106–07 (Va. 2011)

The duty of loyalty requires the fiduciary to act in the interest of the beneficiary within the fiduciary relationship rather than his own self-interest.³⁴ This duty imposes limitations on a fiduciary's ability to engage in self-dealing and requires him to disclose and avoid conflicts of interest.³⁵ The duty of loyalty may also impose a duty to act impartially when the fiduciary owes duties to more than one person.³⁶ Again, the nuances of the duty of loyalty and the available remedies are dictated by the fiduciary relationship in question.

B. Fiduciaries in the Civil Law Tradition and in Louisiana

Civil law has long recognized and regulated a number of relationships that common law would describe as fiduciary relationships. In the civil law tradition, however, liability is imposed by the law of obligations rather than by property or tort. Although civil law and common law share some common legal roots, the role of the fiduciary has evolved somewhat differently in the two systems.

1. Fiduciaries in Roman Law

Roman law recognized several fiduciary-like relationships. For instance, Roman law recognized the contract of mandate and defined it as a contract where "one person (mandatarius) gratuitously undertook to do some act at the request of another."³⁷ Roman law held the mandatary to a higher standard of care by subjecting him to liability for deficient performance or failure to perform. Mandate was "founded on good faith and honour, a breach of it, or even negligence in the performance of the promise, induced the penalties of infamy."³⁸ Roman law imposed a number of duties upon the mandatary: (1) to perform the mandate accepted

(custodian of minors' funds held in Uniform Transfer to Minors Act accounts breached his duty of care in investing in airline on the brink of bankruptcy).

34. See, e.g., *Knudson v. Kylo*, 831 N.W.2d 763, 766 (N.D. 2013) (noting that the "partner's duty of loyalty to the partnership and the other partners" includes duties to account for any profit made, to avoid conflicts of interest, and to "refrain from competing with the partnership"); *In re Philbrick's Estate*, 229 N.W.2d 573, 576 (Wis. 1975) ("The duty of loyalty requires that the executor not be motivated in his actions by self-interest or the interest of third parties.").

35. See BOGERT & BOGERT, *supra* note 29, § 543.

36. See *id.*

37. R.W. LEAGE, *ROMAN PRIVATE LAW FOUNDED ON THE 'INSTITUTES' OF GAIUS AND JUSTINIAN* 304 (1909).

38. 2 PATRICK MAC CHOMBAICH DE COLQUHOUN, *A SUMMARY OF THE ROMAN CIVIL LAW* § 813 (1849).

by him; (2) to diligently follow the instructions of the mandate; (3) to turn over any property acquired as a result of the mandate, including any profit made by the mandatary; and (4) to render an account of his actions.³⁹ The standard of performance incumbent upon the mandatary was more onerous than that of many other contracts.⁴⁰

Roman law also imposed fiduciary-like standards on tutors, who were appointed to manage the property of young children, and curators, who were appointed to manage the property of older children and adults who lacked mental or physical capacity to manage their own property.⁴¹ The rules governing tutors and curators were essentially the same. Tutors and curators were held to exceptionally high standards because they managed the property of people who could not act to adequately protect themselves. Although tutors and curators are not the primary focus of this Article, the modern rules governing other fiduciaries are based on those of tutors and curators.

The position of tutor or curator “was one of honor and duty” at Roman law.⁴² As such, not everyone was permitted to serve as a tutor—the position was generally limited to citizens who were at least 25 years old.⁴³ Certain individuals were disqualified from serving as tutors or curators because they either lacked the required skills or abilities or could not be trusted. A person might lack the required skill or ability due to poverty, poor health, illiteracy, blindness, or advanced age.⁴⁴ A person might have a conflict of interest that disqualified him from office. Creditors and debtors of the pupil or of the pupil’s family were typically disqualified.⁴⁵ Enemies of the pupil or of his family were likewise disqualified.⁴⁶ A

39. WILLIAM A. HUNTER, INTRODUCTION TO ROMAN LAW 48–50 (A.F. Murison ed., 1921); LEAGE, *supra* note 37, at 306–07.

40. *Id.*

41. MARCEL PLANIOL, TREATISE ON THE CIVIL LAW §§ 1751–52 (Louisiana State Law Institute trans., West 1959); HUNTER, *supra* note 39, at 48–50.

42. WILLIAM L. BURDICK, PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 266 (1938).

43. *Id.*

44. ANDREW STEPHENSON, HISTORY OF ROMAN LAW: WITH A COMMENTARY ON THE INSTITUTES OF GAIUS AND JUSTINIAN 366–67 (1912); Charles P. Sherman, *The Debt of the Modern Law of Guardianship to Roman Law*, 12 MICH. L. REV. 124, 125–26 (1913).

45. STEPHENSON, *supra* note 44, at 366–67; 3 MAC CHOMBAICH DE COLQUHOUN, *supra* note 38, § 1736.

46. *See* STEPHENSON, *supra* note 44, at 366–67; 3 MAC CHOMBAICH DE COLQUHOUN, *supra* note 38, § 1736.

person appointed as tutor or curator was morally—and legally—obligated to serve unless he had a valid excuse.⁴⁷

The duties of the tutor and curator were, in many respects, similar to that of the mandatary. In administering the property under his care, the tutor or curator “had to act with absolute good faith and bestow the same care upon the affairs of his ward that a sensible man is expected to use in his own affairs.”⁴⁸ The tutor or curator could be held liable for fraud, neglect, or waste of the property under his care.⁴⁹ Self-dealing by the tutor or curator was generally prohibited. He could not “reap any advantage from his office,” nor could he “authorize any act on the part of his ward that would result in enrichment to himself.”⁵⁰ Finally, the tutor or curator had to account for his administration.⁵¹

Additional safeguards further protected the interest of the pupil. Safeguards were necessary because the pupil was incapable of sufficiently protecting his own interests. In that respect, the nature of the relationship differed from that between a principal and his appointed mandatary. The principal generally had the ability to act for himself to protect his own interests and could terminate the authority of his mandatary at will.

To protect the pupil, the tutor or curator was often required to post security to ensure his competent performance.⁵² He was also required to have an inventory made of the pupil’s property.⁵³ The tutor or curator faced civil, and even criminal, penalties for his malfeasance. He could also be removed from office on the grounds of suspicion. Because the pupil could not bring an action for removal in his own right, many other individuals had both the ability and the duty to bring such actions to protect the interests of the pupil.⁵⁴ General incompetence, neglect for the pupil’s well-being, and hostility between the pupil or his family and the tutor or curator were likewise grounds for removal.⁵⁵

47. Sherman, *supra* note 44, at 124–25.

48. STEPHENSON, *supra* note 44, at 365.

49. BURDICK, *supra* note 42, at 265–66; Sherman, *supra* note 44, at 124.

50. 3 MAC CHOMBAICH DE COLQUHOUN, *supra* note 38, § 1736.

51. *Id.*

52. BURDICK, *supra* note 42, at 267; Sherman, *supra* note 44, at 124–25.

53. BURDICK, *supra* note 42, at 267; Sherman, *supra* note 44, at 124–25.

54. BURDICK, *supra* note 42, at 267; Sherman, *supra* note 44, at 124–25.

55. HENRY JOHN ROBY, ROMAN PRIVATE LAW IN THE TIMES OF CICERO AND OF THE ANTONINES 110 (1902); STEPHENSON, *supra* note 44, at 366–67.

2. *Fiduciaries in Louisiana: Requirement of Good Faith*

All of the Louisiana fiduciaries that this Article considers have an overarching obligation of good faith. The requirement of good faith is similar in both the common law and the civil law traditions. The source of the requirement, however, differs. In the civil law tradition, obligations may arise from a variety of sources, including contracts, declarations of will, and directly from the law.⁵⁶ Regardless of the source of an obligation, “[g]ood faith shall govern the conduct of the obligor and the obligee.”⁵⁷ This overarching rule of good faith applies to mandataries, tutors, curators, succession representatives, and trustees.

a. Mandataries

The Louisiana contract of mandate has much in common with its Roman law ancestor. The mandatary is obligated to act “with prudence and diligence” with respect to “the mandate he has accepted” and is generally prohibited from self-dealing.⁵⁸ The mandatary “is bound to deliver to the principal everything he received by virtue of the mandate” and is usually “bound to account for his performance to the principal.”⁵⁹

b. Tutors and Curators

The Louisiana tutor and curator also have much in common with their Roman counterparts. The tutor and curator are bound to act as “prudent administrator[s]” of the property under their care and are liable for failure to do so.⁶⁰ Self-dealing is either prohibited or carefully regulated.⁶¹ As in the Roman era, additional safeguards further protect the minor or interdict, including the requirement of security and taking of an inventory, periodic reporting obligations, and court supervision.⁶² Grounds for disqualification from serving as tutor or curator are clearly inspired by the Roman tradition. A person who is incapable of prudent administration or who is not trustworthy is disqualified from serving as tutor or curator. Minors, interdicts, and persons who are “proved to be mentally incompetent” or otherwise unfit or incapable due to mental or physical condition are

56. LA. CIV. CODE art. 1757 (2018).

57. *Id.* art. 1759.

58. *Id.* arts. 2998, 3001.

59. *Id.* arts. 3004, 3032.

60. LA. CODE CIV. PROC. arts. 4262, 4566 (2018).

61. *Id.* arts. 4262–67, 4566.

62. *See id.* arts. 4101, 4131–37, 4270–72, 4391–98, 4563–66, 4569.

disqualified.⁶³ A person may also be disqualified because he lacks trustworthiness. Various conflicts of interest—such as being the minor’s or the interdict’s debtor or being an adverse party in litigation—will preclude appointment.⁶⁴ Convicted felons and persons who are unfit for appointment because of “bad moral character” are likewise disqualified.⁶⁵

Roman roots are likewise evident in the laws governing removal and malfeasance. Removal is appropriate if the tutor or curator has mismanaged the property under his care or “has failed to perform any duty imposed by law or by order of court.”⁶⁶ Removal is also allowed for any other good cause, including disqualification and lack of capability of the tutor or curator.⁶⁷

c. Succession Representatives

Louisiana holds succession representatives to a fiduciary-like standard. Many of the Louisiana laws governing succession representatives are based on tutorship and curatorship laws. This is appropriate because the contemporary succession representative serves many similar functions in administering the succession as a tutor or curator serves in administering property. It is also appropriate that the succession representative—like the tutor and curator—is more closely regulated by the court than the mandatary. Unlike the mandatary, the succession representative is not usually selected by the people whose interests he represents, and they are usually unable to remove him at will.

The succession representative “is a fiduciary with respect to the succession” who is held to the same “prudent administrator” standard to which mandataries, tutors, and curators are held.⁶⁸ Self-dealing, although sometimes allowed out of necessity, is closely regulated.⁶⁹ Additional safeguards—such as the requirements of security, inventory, accounting obligations, and court supervision—help ensure that the succession representative does not take advantage of his office.⁷⁰ The laws governing who is qualified to serve as a succession representative are nearly identical to those pertaining to tutors and curators.⁷¹ Succession representatives, like

63. *Id.* arts. 4231, 4561.

64. *Id.*

65. *Id.*

66. *Id.* art. 4234; *see also id.* art. 4568.

67. *Id.* arts. 4324, 4568.

68. *Id.* art. 3191.

69. *Id.* arts. 3194–95.

70. *See id.* arts. 3131–37, 3151–58, 3133–38, 3396.14, 3396.17–.20.

71. *See id.* art. 3097.

tutors and curators, face civil and criminal penalties for malfeasance and may be removed from office. The grounds for removal of a succession representative are essentially the same as those for removal of a tutor or curator.⁷²

d. Trustees

Louisiana also allows the creation of express trusts comparable to those allowed in common law. Some aspects of the common law trust are at odds with traditional civilian thinking and continue to pose theoretical and practical challenges.⁷³ The obligations of the trustee to act as a fiduciary, however, should not pose the same challenges. Although inspired by common law, the Louisiana trustee's fiduciary role is best understood by reference to other comparable civilian concepts, namely mandate, tutorship, curatorship, and the administration of successions.⁷⁴ Like other Louisiana fiduciaries, the trustee is bound to administer the property under his care "as a prudent person would administer it," and he is generally liable under the law of obligations, rather than delict, for his failure to do so.⁷⁵ Self-dealing is either prohibited or closely regulated, as in the case of other Louisiana fiduciaries.⁷⁶ Additional safeguards protect the interest of the beneficiaries, such as the requirements of security, accounting reporting obligations, and the possible intervention and oversight by the courts.⁷⁷ Not everyone is qualified to serve as a trustee, and trustees may be removed for many of the same reasons that tutors, curators, and succession representatives may be removed.⁷⁸

72. See *id.* arts. 3182, 3396.20.

73. See generally Scalise, *supra* note 6; Wisdom, *supra* note 6.

74. See, e.g., LA. CIV. CODE arts. 1, 2, 10, 13 (2013); *Vuskovich v. Thorne*, 498 So. 2d 1072, 1078 (La. 1986) (Dennis, J., dissenting) ("[T]he fiduciary relationship created by a trust is no different from the relationship of an administrator or executor to the heir or legatee, of a curator to an interdict, of a tutor to a minor . . . or from the relationship created by the fiducie of French law, derived from the Roman law."); see also John B. Claxton, *The Fondé de Pouvoir for Holders of Secured Indebtedness: Article 2692 Revisited, A Critical Examination*, 44 MCGILL L.J. 665, 702–03 (1999).

75. LA. REV. STAT. § 9:2090 (2018). At least one court has suggested that the trustee has a higher fiduciary standard than a succession representative. See *Albritton v. Albritton*, 622 So. 2d 709, 713 (La. Ct. App. 1st Cir. 1993).

76. LA. REV. STAT. § 9:2083–86.

77. See, e.g., *id.* §§ 9:2064–68, 9:2088–89, 9:2171–73.

78. See *id.* §§ 9:1783, 1789; see also *infra* Part IV.

3. *Confusion in Louisiana Courts*

Louisiana courts have often cited common law sources and definitions to explain fiduciary relationships.⁷⁹ When the law in question stems from common law rather than civil law, reliance on common law authority makes some sense. For example, Louisiana derives much of its public law and criminal law from the common law tradition.⁸⁰ The regulation of the legal profession in Louisiana is likewise based on the approach in other American states.⁸¹ Cases involving these issues might appropriately look to the common law when necessary. Problems arise, however, when courts continue to look to common law authority for matters clearly governed by Louisiana's private civil law.

Plaquemines Parish Commission Council v. Delta Development Co., Inc., and its progeny provide a useful illustration of this problem.⁸² The case involved a variety of bad acts by Leander Perez, Sr., and his two sons, Leander, Jr., and Chalin. The Plaquemines Parish Commission Council "alleged that the three 'public official' Perezes, Leander Perez, Sr., Chalin Perez and Leander Perez, Jr., wrongfully secured and retained personal interests in publicly owned mineral lands through breaches of their fiduciary duties as public officials and as attorneys."⁸³ The fiduciary duties in question did not stem from Louisiana's private law or from the civil law tradition. Rather, the Perezes' fiduciary duties stemmed from their positions as government attorneys and public officials. In describing these duties, the Court looked to a variety of common law sources, particularly decisions from other state and federal courts.⁸⁴ For example, the Court relied on decisions from California, Minnesota, and Texas for the following proposition:

A fiduciary relationship has been further described as one that exists "when confidence is reposed on one side and there is resulting superiority and influence on the other." The duty

79. See, e.g., *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1040 (La. 1987); *Scheffler v. Adams & Reese, LLP*, 950 So. 2d 641, 647 (La. 2007).

80. See Robert R. Peebles, Jr., *Governmental Tort Liability in Louisiana: A Response to Professor Robertson and a Call for More Study*, 65 TUL. L. REV. 1055, 1083–84 (1991); Ilijana Todorovic, *The Uniqueness of Louisiana's Legal Heritage: A Historical Perspective*, 65 LA. B.J. 378, 380 (2018).

81. See, e.g., *Delta Dev. Co.*, 502 So. 2d at 1041.

82. *Id.* at 1034.

83. *Id.* at 1036.

84. *Id.* at 1036–38.

imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. Relative to the duty of disclosure flowing from the fiduciary relationship, the fiduciary's duty to disclose has been held paramount to the beneficiary's duty to investigate possible conflicts of interest.⁸⁵

This is a fairly typical articulation of common law fiduciary duty and one that made some sense, given the public law nature of the case.

That articulation, however, is inappropriate in a private law context in Louisiana. It suggests that a great many individuals might be subjected to fiduciary standards and liability where they otherwise would have no legal obligation to act as a fiduciary. In other words, it suggests that fiduciary obligations might arise by law *and* by the facts of a particular case. Yet civil law does not generally recognize fiduciary relationships that arise merely by fact. The Court's description wholly ignores the law of obligations and its nearly exclusive role in defining the scope and existence of fiduciary obligations in Louisiana. Indeed, Louisiana jurisprudence contains countless examples of courts that both repeat this common law explanation of what it means to be a fiduciary and misapply it in the private law context. In so doing, courts too often ignore or downplay the actual Louisiana law on point.⁸⁶ This approach has also led to considerable confusion on questions relating to prescription.⁸⁷ Even where the ultimate conclusions are consistent with Louisiana law, the rationales are worrisome.

85. *Id.* at 1040–41.

86. *E.g.*, Succession of McKinley, 206 So. 3d 959, 966–68 (La. Ct. App. 3d Cir. 2016) (relying heavily on the common law articulation to explain breach of fiduciary duty under a general mandate in the estate planning setting while largely ignoring the applicable Louisiana Civil Code articles); Sampson v. DCI of Alexandria, 970 So. 2d 55, 59–61 (La. Ct. App. 3d Cir. 2007) (using the common law articulation to explain the contract of mandate and its accompanying obligations while largely ignoring the applicable Louisiana Civil Code articles); Wadsworth v. ABC Ins. Co., 732 So. 2d 56, 58 (La. Ct. App. 4th Cir. 1998) (refusing to extend the *Delta Development* case definition of fiduciary to a personal relationship on the theory that *Delta Development* applied to commercial situations; failing to recognize that *Delta Development* was a public law case); Kaplan v. Fine, 643 So. 2d 438, 440 (La. Ct. App. 3d Cir. 1994) (correctly holding that woman's social position and friendship with a couple did not make her a fiduciary with respect to their business investments but failing to apply the applicable Louisiana law).

87. *See infra* Section II.F.

II. MANDATARIES

If a mandatory breaches his fiduciary obligations, Louisiana contemplates two methods by which recourse may be sought: the direct action and the action to review.⁸⁸ Each is considered in more detail below.

The direct action refers to the traditional remedies available for mandatory malfeasance. Generally, the principal can sue the mandatory directly for breach of the mandatory's fiduciary duty. If the principal fails to bring suit against the mandatory prior to the principal's death, then the principal's successors may bring suit following the principal's death. In either case, the right to bring suit is tied to the fiduciary relationship. The principal can sue because he is the obligee in the contract of mandate. Following the principal's death, his successors can bring suit because economic harm to the obligee also harms their interests in his estate.

The action to review is different. It is the result of a 2016 legislative enactment that was derived from § 116 of the Uniform Power of Attorney Act and, as a result, does not fit perfectly in Louisiana law.⁸⁹ Generally, the action to review grants various interested parties, other than the principal, the right to bring an action during the life of the principal to review the mandatory's actions.⁹⁰ The action to review is intended to serve more of a prophylactic function. As discussed in more detail below, the action brings the law of mandate and the law of interdiction into closer alignment by facilitating court review of a mandatory's actions prior to the death of the principal.

A. Parties to Litigation Against a Mandatory

As a fundamental matter, the principal is a proper party to bring suit against his mandatory, and the mandatory is the proper defendant. More practically, the principal may be unwilling or unable to bring suit if the principal is being abused or lacks the requisite mental capacity to recognize mandatory malfeasance. Mandatory malfeasance sometimes does not come to light until after the death of the principal or the mandatory. The following section considers these more nuanced issues as applied to both the direct action and the action to review.

88. These actions have not previously been assigned specific names. I name them here in the interest of clarity.

89. See LA. REV. STAT. §§ 9:3851–54 (2018) and accompanying comments.

90. *Id.* §§ 9:3851–54.

1. Direct Action

a. Plaintiff

The principal is the proper party to bring suit against the mandatary for malfeasance because the principal and the mandatary are the parties to the contract that was breached.⁹¹ If the principal is interdicted, then his curator or other legal representative is the proper party to bring suit.⁹² Sometimes, a mandatary's malfeasance does not come to light until after the death of the principal. In such cases, the principal's successors will want to bring suit against the mandatary, and Louisiana law generally allows them to do so.⁹³ The proper parties and procedure depend, in part, on whether the principal's succession is under administration. If the succession is under administration, then the succession representative is the proper party to bring suit against the mandatary.⁹⁴ If the principal's succession is not under administration, then the heirs or legatees of the principal are the proper plaintiffs to bring suit against the mandatary.⁹⁵ The principal's creditors might also have standing in some circumstances.

A deceased principal's succession might not be under administration for one of two reasons: (1) it has not yet been opened; or (2) it has already been concluded. If the succession has not been opened, then a presumptive heir is a proper party to bring suit.⁹⁶ A creditor of the decedent might also have standing to bring suit in some circumstances. If the succession has already been closed, then the parties recognized as heirs or legatees in a judgment of possession are usually the proper parties to bring suit. They might do so by seeking to reopen the succession or through a direct suit against the mandatary.⁹⁷ If the decedent's property was left in trust, then the trustee is also a proper party to bring suit to protect the rights of the beneficiaries.⁹⁸

91. LA. CODE CIV. PROC. art. 681 (2018) ("Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.").

92. *See id.* arts. 684, 694.

93. *See In re Succession of Twine*, 54 So. 3d 71, 72 (La. Ct. App. 5th Cir. 2010).

94. LA. CODE CIV. PROC. art. 685.

95. *Id.* art. 426.

96. *See Woodard v. Upp*, 142 So. 3d 14, 19 (La. Ct. App. 1st Cir. 2014). A presumptive legatee might also have standing in some circumstances.

97. *See In re Succession of Twine*, 54 So. 3d at 72.

98. LA. CODE CIV. PROC. art. 699.

b. Defendant

The mandatory is the proper party to be named as defendant in a suit relating to his inadequate performance or breach. If the mandatory is deceased, interdicted, or under other legal disability, then the action ought to name his successors, curator, or legal representative.⁹⁹ The Louisiana Civil Code sets forth rules of liability when the mandatory appoints a substitute and for liability among multiple mandataries.¹⁰⁰ If relevant, these individuals should also be named as defendants.

c. Dual Appointments and Conflicts of Interest

Difficulties can arise when the person who served as mandatory also serves in another fiduciary position. Estate planning clients routinely select the same person to act as mandatory under a so-called “durable power of attorney” and to serve as executor. Overlap is also common in the case of trustees and executors. Although dual appointments have a number of advantages, they sometimes make it easier for malfeasance to go unnoticed and unchecked. For example, if the mandatory causes harm to the principal, then the principal’s succession representative is generally obligated to pursue any necessary claims against the mandatory following the principal’s death.¹⁰¹ Moreover, the succession representative is usually the only party with standing to bring such a claim while the succession is under administration.¹⁰²

A significant problem arises when the succession representative and the mandatory are, in fact, the same person. The succession representative is obviously unlikely to bring his prior bad acts to light or to bring an action against himself. The law does, however, offer relief to aggrieved heirs, legatees, and creditors in these circumstances. The aggrieved party should bring suit in the succession to simultaneously seek the removal of the succession representative and redress of the succession representative’s prior malfeasance while he served as mandatory. Louisiana clearly allows such actions,¹⁰³ and they are discussed in more depth below.¹⁰⁴

99. *See id.* arts. 733, 734.

100. LA. CIV. CODE arts. 3007, 3009 (2018).

101. *See* LA. CODE CIV. PROC. art. 3211.

102. *See id.* art. 685.

103. *E.g.*, Succession of Grander v. Worthington, 829 So. 2d 1108, 1109–10 (La. Ct. App. 3d Cir. 2002).

104. *See infra* Section III.E.

2. *Action to Review*

The action to review helps to address a recurring practical problem: the gap between mandate and interdiction. A client might execute a broad “durable” mandate as part of his overall estate plan. “Durability,” a term borrowed from common law, means that the authority of the mandatory survives the incapacity—but not the interdiction—of the principal. One purpose of durable power of attorney, or mandate, is to avoid the embarrassment and loss of privacy that results from interdiction proceedings. A durable mandate can often accomplish this goal and enable the mandatory to handle the principal’s financial affairs, medical decisions, and general well-being without going through any court process or supervision. Sometimes that arrangement works well; sometimes it does not.

Prior to Louisiana’s 2016 enactment of the action to review, the incapacitated—but not interdicted—principal had little protection against abuse by his mandatory under a durable mandate. A principal with a significantly diminished mental or physical condition can hardly be expected to terminate the mandate and seek recourse against his mandatory through the direct action. The same is true if the mandatory is abusing the principal. Previously, the principal’s friends, relatives, and caregivers had few legal options if they suspected malfeasance or abuse by a mandatory.¹⁰⁵ If the principal was unwilling or unable to sue the mandatory via the direct action, concerned onlookers had no immediate legal recourse.

Concerned onlookers do, however, have legal recourse in the interdiction setting. Because the interdict is, by definition, unable to adequately monitor the actions of his curator, any interested party has standing to bring suspected malfeasance to the attention of the court.¹⁰⁶ The court can also raise the issue on its own.¹⁰⁷ Roman law took a similar

105. Absent cooperation from the principal or the mandatory, concerned parties had to wait until a direct action could be brought by someone other than the principal. This usually meant waiting until the durable mandate terminated. A durable mandate terminates at the death or interdiction of either the mandatory or the principal. LA. CIV. CODE art. 3024. From a practical standpoint, death or interdiction of the principal is the more likely solution. Following the principal’s interdiction, his curator could bring a direct action against the mandatory. Similarly, following the principal’s death, his heirs or his succession representative could bring a direct action against the mandatory.

106. LA. CODE CIV. PROC. arts. 4234, 4568.

107. *Id.*

approach.¹⁰⁸ Not only were many individuals allowed to bring curator or tutor malfeasance to the attention of the Praetor, but it was also a moral obligation to do so.¹⁰⁹ Following in that Roman spirit, Louisiana takes a broad view of who may bring suspected curator or tutor malfeasance to the attention of the court.¹¹⁰

The action to review brings the contract of mandate closer to interdiction in some circumstances. It allows a party other than the mandatory to bring an action “on behalf of the principal to review the acts of the principal’s mandatory” and to seek relief on the principal’s behalf.¹¹¹

a. Plaintiff

Following the Roman philosophy, courts should take a liberal view of standing in actions to review. Louisiana Revised Statutes § 9:3851 sets forth a broad, if sometimes confusing, class of potential plaintiffs in the action to review: “A person authorized to make healthcare decisions for the principal” is a permissible plaintiff.¹¹² This class includes any person named as an agent for healthcare decisions under Civil Code article 2997(6) and any person who has authority to make medical decisions for another person under Louisiana’s medical consent law.¹¹³ Permitted to bring the action are a “spouse, a parent, or a descendant of the principal,” as well as a “presumptive heir or legatee of the principal.”¹¹⁴ A presumptive heir is someone who stands to inherit from another in intestacy.¹¹⁵ The reference to “legatee” likely means that any person named as a legatee in an existing will executed by the principal can bring the action. This provision is somewhat unusual. Because wills are ambulatory and subject to revocation prior to the death of the testator, they do not usually confer rights on legatees until the time of the testator’s

108. *See supra* Section I.B.1.

109. *See supra* Section I.B.1.

110. *See, e.g.*, LA. CODE CIV. PROC. arts. 4234, 4568 (allowing removal of tutors and curators by the court on its own motion or by motion of any interested party); LA. REV. STAT. § 9:1025 (2018) (allowing actions for removal to be brought by a spouse, relative, interested party, and various nonprofit organizations); *In re McCauley*, 257 So. 3d 255 (La. Ct. App. 2d Cir. 2018) (allowing college that was named defendant in lawsuit to seek removal of tutor).

111. LA. REV. STAT. § 9:3851 (Supp. 2018).

112. *Id.*

113. *Id.* § 40:1159.4.

114. *Id.* § 9:3851.

115. *See Kathryn V. Lorio, Successions & Donations*, in 10 LOUISIANA CIVIL LAW TREATISE § 2:2 (2d ed. 2018).

death. The action to review is an exception to that rule insofar as it confers standing on a presumptive legatee prior to the death of the testator. The action to review continues this exception with respect to non-probate transfers. Anyone who is “named as a beneficiary to receive any real or personal right upon the death of the principal” may bring the action to review.¹¹⁶ In addition to heirs and legatees, this class might include someone named as the beneficiary of a life insurance contract, retirement account, or other non-probate asset. It might also include a person who holds property as a joint tenant with right of survivorship or similar designation in a jurisdiction that recognizes such forms of title. Also permitted to bring the action are a “trustee or beneficiary of an inter vivos or testamentary trust created by or for the principal.”¹¹⁷

Finally, the action to review confers standing on two groups of people not otherwise recognized by Louisiana law. First, a “caregiver of the principal” is authorized to bring the action to review.¹¹⁸ “Caregiver” is not a term found elsewhere in Louisiana law. Second, “[a]ny other person with sufficient interest in the welfare of the principal” may bring the action. Again, this standard is not used elsewhere in Louisiana law.¹¹⁹ In any case, the obvious intent of the statutory regime is to confer standing rather than to deny it. If standing to bring the action to review is doubtful, the court should normally decide in favor of standing.

b. Defendant

The action to review also has a somewhat different rule regarding defendants than the direct action. In the case of the action to review, “[t]he petition shall be verified and shall name as defendants the principal, the mandatary, and any other person against whom relief is sought.”¹²⁰ The action to review also requires personal service on the principal—service on the mandatary alone is insufficient.¹²¹

116. LA. REV. STAT. § 9:3851.

117. *Id.*

118. *Id.*

119. *Id.* An analogy could be made to the “adult friend” described in Louisiana’s medical consent law. *Id.* § 40:1159.4.

120. *Id.* § 9:3851.

121. *Id.*

c. Timing Issues: Distinguishing Between the Direct Action and the Action to Review

Unlike the direct action, the action to review cannot be brought after the death or interdiction of the principal. The contract of mandate automatically terminates at death or interdiction of either the principal or the mandatary, thus precluding any review of the actions of an acting mandatary.¹²² Rather, after the termination of the mandate due to death or interdiction, the principal's curator, successors, substitute mandatary, or succession representative may bring a direct action against the mandatary.

A more challenging question arises if the principal dies during the pendency of an action to review: Can the action to review continue, does death of the principal terminate the action, or can the action to review be converted to a direct action? This question is important for prescription purposes and because the procedures and remedies available under the two actions differ in several respects. Unfortunately, the current statutory regime does little to offer clarity. Louisiana Revised Statutes § 9:3853 simply provides: "Upon the interdiction or death of the principal, the court shall allow a curator with appropriate authority or the principal's legal successor to be substituted for the plaintiff." Taken alone, this language might suggest that the action to review continues after the death or interdiction of the principal. When read in context, however, it should be clear that the death or interdiction of the principal causes the action to review to automatically convert to a direct action. The substituted plaintiff can then decide to pursue or abandon the direct action. If he decides to continue with the direct action, then the procedures and remedies are the same as any other direct action.

B. Venue

Venue is a thorny question in suits against mandataries. As explained below, a plaintiff in the direct action must be careful when pleading venue to avoid prescription issues. The action to review has a distinct set of rules relating to venue that differ from those in the direct action.

1. Direct Action

Several venue options may exist in actions against mandataries. Contract venue is appropriate in most actions involving mandataries because mandate is, of course, a contract. Louisiana Code of Civil

122. LA. CIV. CODE art. 3024 (2018).

Procedure article 76.1 provides that “[a]n action on a contract may be brought . . . where any work or service was performed or was to be performed under the terms of the contract.”¹²³ Mandatary malfeasance can sometimes have tort elements that could support an alternative venue rule.¹²⁴ Actions against mandataries based on tort theories, however, often have unfavorable rules of prescription, as is explained in more detail below.¹²⁵ For that reason, the plaintiff probably should not rely solely on a tort theory for venue purposes.

Venue might also be established under the more general rules relating to the defendant’s residence or domicile.¹²⁶ If the action against the mandatary involves immovable property, then the rules of Louisiana Code of Civil Procedure article 80 may apply. Of particular interest, the article requires that an “action to revoke a donation of immovable property . . . be brought in the parish in which the property is located.”¹²⁷ Finally, if the direct action is brought as part of a related action against a trustee or succession representative, then the venue rules applicable to trusts and successions will generally trump the more permissive tort and contract venue rules.¹²⁸

2. Action to Review

Venue for an action to review is more straightforward—it is based on the domicile or residence of the principal.¹²⁹ If the principal has neither a domicile nor a residence in Louisiana, then venue is proper where “the principal is physically present or where immovable property of the principal is located.”¹³⁰

C. Types of Proceedings and Related Issues

Many actions relating to mandataries must be brought as ordinary proceedings.¹³¹ Actions seeking damages or some other remedy against the mandatary usually arise from contract theories and, as such, are treated

123. LA. CODE CIV. PROC. art. 76.1 (2018).

124. *Id.* art. 74.

125. *See infra* Section II.F.

126. LA. CODE CIV. PROC. art. 42.

127. *Id.* art 80(D).

128. *See discussion infra* Section IV.B.

129. LA. REV. STAT. § 9:3851(D) (2018).

130. *Id.* § 9:3851.

131. LA. REV. STAT. ANN. § 9:3851 cmt. i (2018).

as any other lawsuit. In some instances, a party may seek injunctive relief, in which case the rules pertaining to injunctive relief will apply.

The action to review has some heightened pleading requirements. The petition must be a verified petition, and it “shall state with particularity the facts establishing the petitioner’s right to bring the action, the reasons that a review of the acts of the mandatory is needed, and the relief sought.”¹³²

D. Remedies Available: Direct Action

A variety of remedies are available to redress a breach of fiduciary obligation or other improper action by a mandatory via direct action. The principal, or his successors, may demand an accounting, demand a return of the principal’s property, seek money damages, seek interest, and seek various forms of incidental and injunctive relief.

1. Burden of Proof

Many remedies require the plaintiff to first show that the mandatory breached his fiduciary obligations. Jurisprudence makes it clear that the initial burden rests with the plaintiff: “In order to prove breach of a fiduciary duty, the claimant must show that the party acted fraudulently, breached the trust bestowed upon him, or took actions that exceeded those granted to him.”¹³³

2. Injunctive Relief

In theory, the principal can seek injunctive relief against a mandatory. In reality, injunctive relief will rarely be an appropriate remedy for the direct action: “Injunction is an extraordinary remedy and should only issue where the party seeking it is threatened with irreparable loss without adequate remedy at law.”¹³⁴ This standard presents two major obstacles to injunctive relief against a mandatory. First, injuries that may be compensated by money damages do not usually constitute irreparable harm under Louisiana law.¹³⁵ A breach of fiduciary obligation by a

132. LA. REV. STAT. § 9:3851(B).

133. *In re Succession of McKinley*, 206 So. 3d 959, 967 (La. Ct. App. 3d Cir. 2016).

134. *Accord Licfro, Inc. v. State*, 859 So. 2d 739, 742 (La. Ct. App. 4th Cir. 2003).

135. *E.g.*, *Metro Riverboat Assoc., Inc. v. Bally’s Louisiana, Inc.* 789 So. 2d 565, 566 (La. 2001); *Terrebonne Parish Police Jury v. Matherne*, 405 So. 2d 314, 319 (La. 1981).

mandatary is often susceptible to pecuniary valuation, thus precluding injunctive relief. Second, a principal who is unhappy with his mandatary can simply terminate the mandate, which is a much simpler remedy than seeking an injunction.¹³⁶ The ability of the principal to terminate the mandate is usually a sufficient remedy at law.

Louisiana recognizes a handful of exceptions to the irreparable harm requirement which are discussed in more detail below. Injunctive relief is, however, clearly appropriate in one circumstance: where the mandatary is using his power to isolate the principal.¹³⁷ Civil Code article 2995 provides, in relevant part:

A mandatary shall not prevent or limit reasonable communication, visitation, or interaction between a principal who is over the age of eighteen years and another person without prior court approval, to be granted only upon a showing of good cause by the mandatary, unless express authority has been provided pursuant to Article 2997(7).

The Code of Civil Procedure, in turn, makes it clear that injunctive relief is appropriate in cases of isolation. Article 3601 states that “irreparable injury, loss or damage . . . may result from the isolation of an individual over the age of eighteen years by any other individual, curator, or mandatary”¹³⁸ Taken together, the language in Civil Code article 2995 and Code of Civil Procedure article 3601 suggests that certain third parties have a right of action to seek visitation with the principal. Unfortunately, the mechanics of such an action are unclear, and the implemented legislation leaves much to be desired.¹³⁹

3. Demanding an Accounting

At least two Civil Code articles reference the mandatary’s accounting obligation. Article 3003 provides that “the mandatary is bound to provide information and render an account of his performance of the mandate” whenever the principal so requests or “when the circumstances so require.”

136. See LA. CIV. CODE art. 3025 (2018).

137. LA. CODE CIV. PROC. art. 3601 (2018).

138. *Id.* art. 3601(E).

139. Act 110 of the 2016 Legislative Session made several changes to the law aimed at addressing the isolation and visitation of older adults, including the language relating to mandataries. That same act expressly created a cause of action for visitation with an interdict and set out applicable rules of procedure. See LA. CODE CIV. PROC. art. 4570. Perhaps that action should apply by analogy.

Article 3032 provides: “Upon termination of the mandate, unless this obligation has been expressly dispensed with, the mandatary is bound to account for his performance to the principal.”

The principal may demand an accounting himself. An accounting may also be demanded by a curator following the principal’s interdiction. Heirs and legatees may demand an accounting following the principal’s death. This remedy is useful when the heirs and legatees suspect—but cannot yet prove—that a mandatary acted improperly with respect to a decedent’s assets. The demand for an accounting serves a number of strategic litigation functions, some of which are discussed in more detail in the sections pertaining to succession representatives and trustees.

As a matter of courtesy, it is customary in most cases to ask the mandatary for an accounting prior to actually filing a suit. Obviously, this request should be made in writing and adequately documented. If, or when, the mandatary refuses to comply, is unresponsive, or offers a deficient accounting, filing suit is appropriate. Certain factual scenarios, including considerations of prescription, may dictate a more aggressive course of action.

4. Demanding the Return of Property

Civil Code article 3004 requires the mandatary “to deliver to the principal everything he received by virtue of the mandate, including things he received unduly.” This article requires the mandatary to return any property that the mandatary applied for his own use without the authorization of the principal. Damages under this part of article 3004 generally take the form of restitution damages. For example, if the mandatary makes gratuitous gifts to himself of the principal’s property without the authorization to do so, then the court should order the mandatary to return the property, or its value, to the principal.¹⁴⁰

The mandatary is generally prohibited from seeking to deal on his own account for his own benefit: “He may not speculate for his gain in the subject-matter of his employment.”¹⁴¹ As result, article 3004 also requires the mandatary to turn over “things he received unduly” to the principal. Damages under this part of article 3004 generally take the form of

140. *E.g.*, *Levy v. Levy*, 829 So. 2d 640, 649 (La. Ct. App. 4th Cir. 2002) (noting that the trial court was correct to conclude that the mandatary was required to restore assets he converted for his own personal use).

141. *Woodward v. Steed*, 680 So. 2d 1320, 1326 (La. Ct. App. 2d Cir. 1996) (citing *Neal v. Daniels*, 47 So. 2d 44, 45 (La. 1950)).

disgorgement or lost profits.¹⁴² As illustrated by *Woodward v. Steed*,¹⁴³ these are useful remedies in appropriate cases. Woodward left the state for a lengthy period of time to pursue gender affirmation surgery.¹⁴⁴ He left his neighbor and friend, Steed, in charge of his affairs and instructed Steed to find buyers for a parcel of property that Woodward owned.¹⁴⁵ Steed convinced Woodward to sell the property to him.¹⁴⁶ Meanwhile, without informing Woodward, Steed struck a deal with a casino to turn around and sell the property to the casino for significantly more money than he paid to Woodward.¹⁴⁷ The court found that Steed breached his obligations as mandatary by using “his position to act contrary to, or to the detriment of, Woodward’s interests.”¹⁴⁸ The court described this as “a classical conflict of interest contemplated in the Civil Code and case law” and ordered Steed “to account for and restore to C.K. Woodward the profits derived from Steed’s breach of his fiduciary duty to Woodward.”¹⁴⁹

5. Money Damages

Under article 3004, pecuniary damages may take the form of reimbursement, disgorgement, lost profits, or all three. Other types of money damages are also contemplated by the Civil Code. The principal may recover damages for a variety of reasons, but two common examples in the estate planning setting involve a mandatary who exceeds the scope of his authority and a mandatary who self-deals without proper authorization.¹⁵⁰

The Civil Code offers helpful guidance for determining the appropriate measure of damages. Article 3001, for example, provides that the mandatary is “responsible to the principal for the loss that the principal

142. *E.g.*, *Norwood v. Mobley Valve Servs.*, 144 So. 3d 1143, 1149 (La. Ct. App. 2d Cir. 2014) (requiring defendants to pay over a portion of profits derived from a sale that was done in breach of their fiduciary duties).

143. *Woodward*, 680 So. 2d 1320.

144. *Id.* at 1322.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1326.

149. *Id.* at 1326, 1327.

150. *See, e.g.*, *Baxter v. Lewis*, 247 So. 3d 873, 875 (La. Ct. App. 3d Cir. 2018) (alleging fraud and self-dealing by mandatary prior to death of principal); *In re Succession of McKinley*, 206 So. 3d 959, 968 (La. Ct. App. 3d Cir. 2016) (finding mandatary engaged in self-dealing and exceeded scope of his authority); *Levy v. Levy*, 829 So. 2d 640, 642–43 (La. Ct. App. 4th Cir. 2002) (mandatary made gifts to himself and his wife from principals’ property without authorization to do so).

sustains as a result of the mandatary's failure to perform." Similarly, article 3008 provides that "[i]f the mandatary exceeds his authority, he is answerable to the principal for resulting loss that the principal sustains." Louisiana courts have not had sufficient opportunity to consider articles 3001 and 3008 in the estate planning context. The jurisprudence, however, contains ample examples of these damages in other contexts that may make useful comparisons.¹⁵¹

6. Interest

All types of suits for money damages may seek interest awards. The availability and rate of interest is not usually controversial. Louisiana law is clear that "[t]he court shall award interest in the judgment" if it is prayed for or otherwise authorized by law.¹⁵² Interest is awarded at the legal rate.¹⁵³ The tricky issue is determining exactly when interest begins to accrue. The date on which interest should commence depends on the facts and circumstances. Generally, interest on tort judgments "shall attach from date of judicial demand."¹⁵⁴ Contract damages have varying rules, some of which allow for interest to commence at an earlier date. For instance, "[w]hen the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due."¹⁵⁵

Mandatary malfeasance in the estate planning context often involves the mandatary using the principal's property for his personal use without authorization from the principal. As discussed above, the mandatary can be ordered to reimburse the principal or his estate for misappropriated funds. Additional damages in the form of interest are also available in such cases. Civil Code article 3005 provides that "[t]he mandatary owes interest, *from the date used*, on sums of money of the principal that the mandatary applies to his own use."¹⁵⁶ In such cases, it is irrelevant whether the conduct sounds in tort or contract—interest begins to accrue from the date the mandatary used the money.

151. See, e.g., *Sampson v. DCI of Alexandria*, 960 So. 2d 55, 59 (La. Ct. App. 3d Cir. 2007) (failure to procure insurance policy); *Huval v. Offshore Pipelines*, 86 F.3d 454, 459 (5th Cir. 1996) (failure to procure proper insurance).

152. LA. CODE CIV. PROC. art. 1921 (2018).

153. LA. REV. STAT. § 13:4202 (2018).

154. *Id.* § 13:4203. *But see* *Farrar v. Whaley*, 211 So. 3d 449, 461 (La. Ct. App. 3d Cir. 2017) (holding that "interest on damages for conversion is usually awarded from the day of conversion").

155. LA. CIV. CODE art. 2000 (2018).

156. *Id.* art. 3005 (emphasis added).

7. Defenses of Mandatary

Some unique defenses are available to the mandatary. A mandatary may attempt to mitigate the extent of money damages he owes by seeking reimbursement for fees and other expenses.¹⁵⁷ Additionally, the mandatary might seek relief under Civil Code article 3002 if the mandate is gratuitous, as is the case with many mandates in the estate planning setting. Article 3002 grants courts the discretion to “reduce the amount of loss for which the mandatary is liable” if the mandate is gratuitous. Only a handful of reported decisions have addressed this issue, and they have largely concerned commercial transactions in which the relationships involved were quite different than those seen in the estate planning context. Given the very real harms that accompany abuse by mandataries in the estate planning setting, courts should be hesitant to grant relief to the mandatary under article 3002 absent significant mitigating circumstances.

E. Remedies Available: Action to Review

The remedies available in the action to review differ in some important respects from the remedies available in the direct action. In some cases, the differences are quite logical in light of the differing interests served by the two actions. In other cases, the action to review ostensibly permits remedies that may be at odds with more general Louisiana legal principles.

1. Burden of Proof

The action to review has a unique standard for decision-making. Courts are directed to “consider the mandate” and permitted to “consider any other relevant factors.”¹⁵⁸ Louisiana Revised Statutes § 9:3854 sets forth a non-exclusive list of relevant factors as follows:

- (1) The expressed wishes of the principal.
- (2) The known or reasonable expectations of the principal.
- (3) The best interests of the principal.
- (4) Any will, trust, or beneficiary designation executed by the principal.
- (5) The principal’s history or pattern of donations inter vivos.
- (6) Physical, financial, or psychological abuse of the principal.
- (7) Fraud, duress, or undue influence.
- (8) The principal’s regular contact with family and friends other

157. See *Levy v. Levy*, 829 So. 2d 640, 649 (La. Ct. App. 4th Cir. 2002).

158. LA. REV. STAT. § 9:3854.

than the mandatary.

- (9) The ability of the principal to comprehend generally the nature and consequences of the acts of the mandatary.
- (10) The donee's knowledge or imputed knowledge that a donation was not for the benefit or gratification of the principal.
- (11) The good or bad faith of a defendant.¹⁵⁹

These factors, which were imported from the Uniform Power of Attorney Act, are clearly aimed at protecting the well-being of the principal and preventing various forms of elder abuse.

2. *Injunctive Relief*

Injunctive relief is available in the action to review. While the action is pending, the court is permitted to “[e]njoin the mandatary from exercising all or some of the powers granted by the mandate during the pendency of the action.”¹⁶⁰ In other words, the court is permitted to issue a temporary suspension of the mandatary's authority pending a hearing. Injunctive relief may also be ordered by the court after a hearing as part of its ultimate resolution of the case.¹⁶¹

Interestingly, injunctive relief is more readily available in the action to review than in the direct action. Injunctive relief is available in the action to review without a showing of irreparable injury.¹⁶² As a result, the third party challenging the acts of the mandatary has greater rights than the principal has in his own right. A principal, however, is usually free to simply terminate the mandate at any time without the necessity of an injunction or court proceeding, which is a simple remedy not available to a third party.¹⁶³

3. *Remedies During Pendency of the Proceeding*

In addition to injunctive relief, a variety of remedies are available during the pendency of the action to review. The court may, for example, order an accounting and order discovery on its own motion.¹⁶⁴ The court may “[o]rder, without first holding a contradictory hearing, a financial

159. *Id.*

160. *Id.* § 9:3854(A)(2).

161. *Id.* § 9:3854.

162. *Id.*

163. *See* LA. CIV. CODE art. 3025 (2018).

164. LA. REV. STAT. § 9:3854.

institution, a healthcare provider, or any other person to provide the financial, medical, or other information of any defendant to the action.”¹⁶⁵ The comments of the Revised Statutes point out that this is a departure from other provisions of law that would ordinarily require a hearing prior to ordering the disclosure of such confidential information.¹⁶⁶ Jurisprudence in other settings demonstrates how this information might be useful to the court and to the litigants.¹⁶⁷

The court is permitted to “[a]ppoint a qualified person to investigate the allegations of the petition and to report the findings.”¹⁶⁸ The statute provides no guidance on who the court should appoint to conduct such an investigation. Jurisprudence in other settings demonstrates what types of persons the court might consider appointing. For example, forensic accountants are often called upon to review financial records and to determine whether financial wrongdoing occurred.¹⁶⁹ Similarly, doctors, nurses, psychologists, and social workers are often called upon to review records and conduct interviews or examinations related to physical health, mental health, physical abuse, and sexual abuse.¹⁷⁰

The court may “[a]ppoint a person to exercise some or all of the authority granted by the mandate . . . if there is no successor or substitute mandatarly named in the mandate who is able or willing to serve, or if no law otherwise provides a person to act.”¹⁷¹ Other Louisiana laws that

165. *Id.* § 9:3854(B)(2).

166. LA. REV. STAT. ANN. § 9:3854 cmt. c (2018).

167. *See, e.g.,* G.N.S. v. S.B.S., 796 So. 2d 739, 742 (La. Ct. App. 2d Cir. 2001) (medical records from emergency room visit provided evidence of child abuse); *In re Dumas*, 187 So. 3d 428, 431 (La. 2016) (bank statements and other documents showed evidence that attorney mishandled funds).

168. LA. REV. STAT. § 9:3854(B)(3).

169. *See, e.g.,* State *ex rel.* P.B. v. Reed, 197 So. 3d 817, 821 (La. Ct. App. 5th Cir. 2016) (court appointed a forensic accountant to review father’s financial circumstances in child support case); *Dumas*, 187 So. 3d at 431 (bank statements and other documents showed evidence that attorney mishandled funds).

170. *See, e.g.,* McIntosh v. McIntosh, 768 So. 2d 219, 220–22 (La. Ct. App. 2d Cir. 2000) (court “appointed E.H. Baker, Ph.D., to conduct psychological evaluations of the parents and children”); State v. Adams, 78 So. 3d 222 (La. Ct. App. 5th Cir. 2011) (Experts were called upon to determine whether the death of an elderly man resulted from being harmed by another person or accidental injury. The testimony included a forensic pathologist, a forensic anthropologist, and a physician who was an expert in geriatrics, elder abuse, and osteoporosis.); State v. Smith, 870 So. 2d 618, 622 (La. Ct. App. 2d Cir. 2004) (observations of psychiatrist, social workers, and others relevant in determining whether elderly woman had been abused).

171. LA. REV. STAT. § 9:3854(B)(6).

would “provide a person to act” include medical consent laws, with respect to medical treatment,¹⁷² curator and interdiction laws,¹⁷³ and laws governing the management of community property.¹⁷⁴ In the absence of an existing person empowered to act, the court can appoint a curator-like person without the type of hearing or process required for interdiction. This is a somewhat curious provision. If applied improperly, the provision could conflict with Louisiana’s interdiction laws. This remedy is best understood as an interim measure that permits the court to appoint a curator-like person to serve temporarily. The provision should not be construed as a means to circumventing the normal interdiction procedures. Indeed, the overall statutory scheme suggests that the court’s authority under Louisiana Revised Statutes § 9:3854(B)(6) to appoint a curator-like person ought to be temporary in nature. If the principal requires a more permanent decisionmaker and lacks capacity to select one himself, then an interdiction is the appropriate long-term remedy.

4. Defenses and Related Matters

The principal may oppose the action to review. Louisiana Revised Statutes § 9:3852 specifically allows the principal to file a motion to dismiss the action to review. Opposition, however, subjects the principal to potentially invasive and embarrassing court scrutiny. Before reaching a decision, the court is required to hold a hearing on the motion “to determine whether the principal is aware of the acts of the mandatary and not subject to fraud, duress, or undue influence, is able to comprehend generally the nature and consequences of the acts of the mandatary, and appears able to make reasoned decisions.”¹⁷⁵

The statute generally requires the principal to testify in person in support of this motion to allow the court to assess his mental and physical capacity, as well as to determine the existence of any fraud, duress, or undue influence.¹⁷⁶ Alternatively, the court may allow the principal to testify via “visual remote technology or by deposition” in appropriate circumstances.¹⁷⁷ Interesting questions may arise in the future regarding the evidentiary significance of the court’s findings at such a hearing in a later will contest or similar litigation involving the principal’s testamentary capacity or undue influence.

172. *Id.* § 40:1159.4.

173. LA. CIV. CODE art. 389–99 (2018).

174. *Id.* art. 2346–2355.1.

175. LA. REV. STAT. ANN. § 9:3852 cmt. a (2018).

176. *Id.* § 9:3852 cmt. c.

177. LA. REV. STAT. § 9:3852.

The court is given broad discretion to award attorneys' fees and costs in the action to review.¹⁷⁸ If, however, an action to review is dismissed on the merits, then the court is prohibited from awarding costs or attorneys' fees to the petitioner.¹⁷⁹

F. Prescription

The prescriptive period applicable to mandataries has caused some confusion in the Louisiana courts—in part because of distinctions between the common law and the civil law traditions. At first blush, actions against mandataries may seem to sit at the intersection of obligations and delict. The prescriptive periods for those two actions are quite different: Delictual actions are subject to a one-year prescriptive period,¹⁸⁰ whereas personal actions, such as those for breach of contract, are usually subject to the 10-year prescriptive period applicable to personal actions.¹⁸¹ In common law, breach of fiduciary duty is usually a tort and is subject to a tort statute of limitations.¹⁸² Civil law views the issue quite differently. A suit for breach of any fiduciary obligation stemming from the contract of mandate is quite clearly a suit on a contract and a personal action subject to the 10-year prescriptive period.

Most Louisiana courts are in agreement that “[b]reaches of fiduciary duty are considered personal actions . . . subject to the ten year prescription.”¹⁸³ To preserve the benefit of 10-year prescription, it is apparently helpful for the plaintiff to specifically allege “self-dealing, breach of the duty of loyalty, fraud, or breach of trust on the part of his fiduciary.”¹⁸⁴ Louisiana courts have occasionally, and usually incorrectly, described some breaches of fiduciary duty as delictual.¹⁸⁵

In borderline cases, public policy concerns generally support a 10-year prescriptive period. Louisiana courts have long held that prescription

178. *Id.* § 9:3855.

179. *Id.*

180. LA. CIV. CODE art. 3492 (2018).

181. *Id.* art. 3499.

182. *See supra* Part I.

183. *De La Vergne v. De La Vergne*, 745 So. 2d 1271, 1275 (La. Ct. App. 4th Cir. 1999); *accord* *Baxter v. Lewis*, 247 So. 3d 873, 876 (La. Ct. App. 3d Cir. 2018); *Norwood v. Mobley Valve Servs., Inc.*, 144 So. 3d 1143, 1148 (La. Ct. App. 2d Cir. 2014).

184. *Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 478 (5th Cir. 2002); *accord* *Babin v. Quality Energy Servs., Inc.*, 877 F.3d 621, 626 (5th Cir. 2017).

185. *E.g., De La Vergne*, 745 So. 2d at 1276; *Pence v. Austin*, 191 So. 3d 608, 614 (La. Ct. App. 1st Cir. 2016).

statutes ought to be construed in a manner that “favors maintaining rather than barring the action.”¹⁸⁶ This generally favors the longer prescriptive period. Similarly, Louisiana jurisprudence has long held that claims arising out of quasi-contract prescribe in 10 years.¹⁸⁷ Again, this suggests that borderline cases ought to be afforded the longer prescriptive period.

To distinguish between delict and contract, some courts look at whether the duty owed by the mandatary is one that arises out of the fiduciary relationship or whether it is more akin to common negligence.¹⁸⁸ Another way of distinguishing delict and contract is to consider the nature of the harm. For example, “[w]here the unlawful act of one person simply damages another without resulting benefit to the wrongdoer, there is a simple tort; and the action for reparation is prescribed by one year.”¹⁸⁹ On the other hand, “[w]here the unlawful act of one person not only damages another, but also enriches the wrongdoer, there arises an action both *ex delicto* and *quasi ex contractu* and the action to recover the unlawful gain is barred by the prescription of ten years.”¹⁹⁰

1. Prescription: Demand for Accounting

The right to demand an accounting is a personal action subject to a 10-year prescriptive period.¹⁹¹ It may be difficult to discern when prescription commences in an accounting action, and few cases have considered the accounting obligation in the mandatary context. Cases involving the accounting obligations of other fiduciaries, such as succession representatives and trustees, should usually be applicable by analogy. As is discussed in more detail in Section III.E, Louisiana jurisprudence indicates the prescriptive period may be tacked to the prescription of actions against the succession representative in some cases.

186. *Foster v. Breaux*, 270 So. 2d 526, 529 (La. 1972).

187. *See Garland v. Estate of Scott*, 15 La. Ann. 143, 145 (1860); *Kilpatrick v. Kilpatrick*, 660 So. 2d 182, 186 (La. Ct. App. 2d Cir. 1995).

188. *Norwood*, 144 So. 3d at 1148 (“The distinction between damages *ex contractu* and damages *ex delicto* is that the former flow from the breach of a special obligation contractually assumed by the obligor, whereas the latter flow from the violation of a general duty owed to all persons.”).

189. *Whitten v. Monkhouse*, 29 So. 2d 800, 804 (La. Ct. App. 2d Cir. 1947).

190. *Id.*

191. *See Garland*, 15 La. Ann. at 145.

2. *Louisiana Revised Statutes § 9:5647: Five-Year Prescription in Action to Set Aside Document*

Louisiana Revised Statutes § 9:5647 imposes a five-year prescriptive period on some actions “to set aside a document or instrument on the ground that the party executing the document or instrument under authority of a power of attorney was without the authority to do so, or that the power of attorney was not valid.” The prescriptive period begins on “the date on which the document or instrument is recorded in the conveyance records, or the mortgage records if appropriate.”¹⁹² The limitation does not, however, “limit . . . any action or proceeding which may arise between a principal and the person acting under authority of a power of attorney.”¹⁹³

3. *Action to Review*

The statutes that set forth the action to review do not refer to any particular prescriptive period. The prescriptive periods otherwise applicable to actions against mandataries presumably apply to the action to review in appropriate circumstances. The language of the overall statutory scheme makes it clear that the mandatary should be currently acting as such when the action is brought.

III. SUCCESSION REPRESENTATIVES

Many of the rules governing succession representatives are derived from the rules regulating tutors and curators. Like other fiduciaries, the succession representative must “act at all times as a prudent administrator.”¹⁹⁴ The fiduciary responsibility of the succession representative is, however, somewhat different than the responsibility of other fiduciaries because his fiduciary obligations are owed to both creditors and heirs or legatees.¹⁹⁵ Adding to potential complexity, the succession representative may serve dual roles: It is common for the succession representative to also be a creditor, heir, or legatee of the decedent. If heirs, legatees, or creditors believe that the succession representative’s performance is deficient, they have a variety of remedies.

192. LA. REV. STAT. § 9:5647(A) (2018).

193. *Id.*

194. LA. CODE CIV. PROC. art. 3191(A) (2018).

195. See, e.g., *In re Succession of Sylvester*, 215 So. 3d 368, 372 (La. Ct. App. 5th Cir. 2016) (succession representative’s “fiduciary duty extends to legatees, creditors, and heirs of the succession.”).

*A. Parties to Litigation Against a Succession Representative**1. Plaintiff*

Any party with an interest in the decedent's estate as an heir, legatee, trust beneficiary, trustee, or creditor might be a plaintiff in an action against an executor or administrator, depending on the facts and circumstances.¹⁹⁶ In appropriate cases, suit might be brought by the successor or legal representative of the injured party.

2. Defendant

The succession representative is the proper defendant in actions relating to his malfeasance. If he is deceased, suit may be brought against his succession. Suit may also be brought against his successors if his succession is not under administration.

B. Venue

The Louisiana Code of Civil Procedure does not contain a specific venue rule for actions against succession representatives. In most cases, venue depends on whether the succession is under administration.

1. Succession Under Administration

If the succession is under administration, then actions against the succession representative should usually be brought in the succession proceeding. This approach is endorsed implicitly by the Code of Civil Procedure.¹⁹⁷

2. Closed Succession

When the court has closed the succession and discharged the succession representative, venue is less clear. As a practical matter, closing the succession and discharging the succession representative sometimes precludes subsequent litigation. Usually, the appropriate remedy for parties who object to the disposition of a succession is to appeal the

196. *E.g.*, Succession of Mitchell, 574 So. 2d 500, 502 (La. Ct. App. 3d Cir. 1991) (person who was not an heir, legatee, or creditor of the succession lacked standing to sue succession representatives).

197. *See* LA. CODE CIV. PROC. arts. 3182, 3332, 3334.

judgment of possession.¹⁹⁸ If, however, the aggrieved party was not a party to the succession proceeding and did not have an opportunity to be heard, then reopening the succession might be a viable option. The petition to reopen a succession should be brought in the same venue as the initial succession proceeding.¹⁹⁹

A succession may be reopened “if other property of the succession is discovered or for any other proper cause.”²⁰⁰ Courts have generally construed “other proper cause” narrowly, noting that the primary purpose of the article is to deal with overlooked assets or with a newly discovered valid will after the succession has been closed.²⁰¹ Some courts, however, have given the article a more liberal interpretation, particularly when the party seeking to reopen the succession was not a party in the original proceeding. In *Succession of Simon*, for example, the decedent’s nephew sought to reopen a succession to claim an interest in the decedent’s separate property.²⁰² The nephew was allowed to do so, in part, because the judgment closing the succession was an ex parte proceeding to which he was not a party.²⁰³ A handful of other cases have suggested that fraud and other egregious conduct might also justify reopening a succession.²⁰⁴

C. Types of Proceedings and Related Issues

The procedural rules in actions against succession representatives can feel a bit peculiar because successions utilize both ordinary and summary proceedings.²⁰⁵ Successions may also be opened and succession

198. See *Jones v. Jones*, 86 So. 3d 25, 29 (La. Ct. App. 2d Cir. 2012); *In re Successions of Gurtner*, 982 So. 2d 952, 956 (La. Ct. App. 4th Cir. 2008).

199. See LA. CODE CIV. PROC. art. 3393.

200. *Id.* art. 3393(A).

201. See, e.g., *In re Succession of Dale*, 259 So. 3d 1032, 1034–35 (La. Ct. App. 1st Cir. 2018) (“Courts have found ‘other proper cause’ under La. Code Civ. P. art. 3393. to exist under extremely limited circumstances, such as where a **valid** will is discovered after the administration of a succession.”); *accord* *Succession of Lasseigne*, 488 So. 2d 1303, 1306 (La. Ct. App. 3d Cir. 1986).

202. *Blanc v. Succession of Simon*, 295 So. 2d 569, 572 (La. Ct. App. 3d Cir. 1974).

203. *Id.*

204. *Succession of Chatelain*, 788 So. 2d 620, 622–26 (La. Ct. App. 4th Cir. 2001) (Plotkin, J., dissenting); *Succession of McCarthy*, 583 So. 2d 140, 142 (La. Ct. App. 1st Cir. 1991).

205. See LA. CODE CIV. PROC. ANN. art. 2971 cmts. a, b (2003); see also LA. CODE CIV. PROC. art. 2931 (2018) (action to annul a testament tried as summary proceeding).

representatives appointed on an *ex parte* basis.²⁰⁶ This approach can add some additional confusion if some aspect of the succession or the appointment of the succession representative is later contested. The rules relating to service and citation in contested successions are also slightly different from comparable rules in other settings.²⁰⁷

Most actions considered in this Article are against acting succession representatives. In such cases, the succession is already open, and the action is brought within the existing succession proceeding. An action to remove a succession representative, for instance, should be brought in the succession proceeding and tried as a summary proceeding.²⁰⁸ Similarly, the demand for an accounting from the succession representative can also be brought summarily in the succession proceeding.²⁰⁹ An opposition to an accounting is likewise tried as a summary proceeding.²¹⁰ At least one case—*Succession of Twine*—has held that a court may order an accounting without a prior evidentiary hearing.²¹¹

The Code of Civil Procedure is less clear on whether actions for damages against succession representatives should be brought as summary proceedings or as ordinary proceedings. The reported decisions seem to imply that the answer depends on whether they are brought in connection with some other action, such as an action seeking removal of a succession representative or opposition of an accounting. Where damages are awarded in connection with an action that can otherwise be brought as a summary proceeding, it appears that the damages can be awarded as a part of that same proceeding.²¹²

D. Remedies Available

A variety of remedies are available in actions against a succession representative. Some remedies seek to prevent additional harm or to facilitate a better administration of the estate. Others seek to redress actual financial harm caused by the succession representative's malfeasance. In

206. See, e.g., LA. CODE CIV. PROC. arts. 2881–93, 3001, 3031, 3061 (2018).

207. See LA. CODE CIV. PROC. ANN. art. 2971 cmt. a (2003).

208. LA. CODE CIV. PROC. art. 3182 (2018).

209. See *id.* art. 3331.

210. *Id.* art. 3336.

211. *In re Succession of Twine*, 54 So. 3d 71, 73 (La. Ct. App. 5th Cir. 2010).

212. See, e.g., *Succession of Vazquez*, 976 So. 2d 209, 212 (La. Ct. App. 4th Cir. 2008) (succession representative ordered to pay reimbursement in a hearing on a motion); *Succession of Raziano*, 538 So. 2d 1136, 1137 (La. Ct. App. 5th Cir. 1989) (succession representative ordered to pay reimbursement in a hearing on a rule to show cause).

many instances, the remedies are similar to remedies available in the direct action against a mandatary.

1. Injunctive Relief

Injunctive relief may be sought against a succession representative. As discussed in Section II.D.2, above, injunctive relief usually requires a showing of irreparable harm and lack of adequate remedy at law. Damages in the succession setting are sometimes susceptible of pecuniary valuation, thus precluding a finding of irreparable harm.²¹³ Louisiana jurisprudence, however, recognizes a variety of instances in which injunctive relief is allowed that might be applicable in actions against succession representatives or other fiduciaries.

Injunctive relief is usually allowed “when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right.”²¹⁴ Some courts allow injunctive relief when the case involves a property owner seeking to protect his rights in immovable property.²¹⁵ Injunctive relief is available in the face of potential violations of certain contractual obligations.²¹⁶ The possibility of harm to goodwill, reputation, or competitive edge may also support injunctive relief.²¹⁷

Few cases have considered injunctive relief in depth in the successions context. Two, however, offer some insight. In *Nunez v. Erbeling*, the decedent’s forced heirs unsuccessfully sought to enjoin the executor from selling cattle that had belonged to the decedent.²¹⁸ The forced heirs complained that if the sale proceeded as planned, then they would not have adequate opportunity to count and appraise the cattle.²¹⁹ The court, however, noted that the forced heirs “failed to show the necessary irreparable harm to entitle them to the issuance of an injunction” because

213. See *In re Succession of Scurria*, 47 So. 3d 620, 630 (La. Ct. App. 2d Cir. 2010).

214. *Constr. Diva, LLC, v. New Orleans Aviation Bd.*, 206 So. 3d 1029, 1035 (La. Ct. App. 4th Cir. 2016); *accord Jurisich v. Jenkins*, 749 So. 2d 597, 599 (La. 1999).

215. See *Cason v. Chesapeake Operating, Inc.*, 92 So. 3d 436, 445 (La. Ct. App. 2d Cir. 2012).

216. See *Reliable Amusement Co., Inc. v. Poche*, 853 So. 2d 1137, 1138 (La. Ct. App. 5th Cir. 2003).

217. *E.g., Historic Restoration, Inc. v. RSUI Indem. Co.*, 955 So. 2d 200, 209 (La. Ct. App. 4th Cir. 2007).

218. *Nunez v. Erbeling*, 442 So. 2d 1335, 1336 (La. Ct. App. 3d Cir. 1983).

219. *Id.*

“any loss suffered as a result [of selling the cattle] is injury which could be readily compensated in money and easily measured by pecuniary standards.”²²⁰ The court also suggested that injunctive relief was not needed because the Code of Civil Procedure articles relating to probate procedure afforded many additional protections and remedies to the forced heirs.²²¹ The court’s suggestion is notable because some of those protections would not be available if the succession representative was acting as an independent succession representative. Perhaps injunctive relief would be appropriate against an independent succession representative.

The use of human gametes, in contrast, does support injunctive relief. *Hall v. Fertility Institute of New Orleans* involved competing claims to a decedent’s frozen sperm.²²² The executor claimed that the frozen sperm belonged to the succession. The decedent’s girlfriend, on the other hand, claimed that the decedent had donated the frozen sperm to her.²²³ The court found that injunctive relief was appropriate pending trial on the merits because of the nature of the potential harm:

We have examined the consequences should preliminary injunctive relief be denied, and find the potential consequences to constitute irreparable harm. Should St. John be allowed to obtain Hall’s sperm deposits during the pendency of this action, one or more embryos could well come into existence. Depending on the length of time the matter requires prior to final conclusion, the possible development of human beings is such a serious consequence that the irreparable nature of the risk at issue is clear. The emotional damage to the decedent’s mother and Executrix should the donation prove to have been illegally obtained and children sired against the wishes of her dead son is obvious and cannot be compensated adequately. Further, the determination of the validity of the act of donation should be made without the influence of the existence of embryos or an actual pregnancy.²²⁴

Taken together, *Nunez v. Erbelding* and *Hall v. Fertility Institute of New Orleans* represent opposite ends of the spectrum. Courts will have to look to other jurisprudence for guidance on more nuanced factual scenarios.

220. *Id.* at 1337–38.

221. *Id.* at 1338.

222. *Hall v. Fertility Inst. of New Orleans*, 647 So. 2d 1348 (La. Ct. App. 4th Cir. 1994).

223. *Id.* at 1349–50.

224. *Id.* at 1351.

2. *Demanding an Accounting*

The succession representative's obligations of good faith and prudent administration require him to identify interested parties and to keep them apprised of the administration of the succession.²²⁵ A useful method of compelling performance of this obligation is to demand an accounting from the succession representative. A demand for an accounting serves many of the same strategic functions in actions against succession representatives as it does in actions against mandataries. Sometimes, the succession representative was also the decedent's mandatory prior to death, in which case the demand for accounting should cover both positions.²²⁶ If relevant, the succession representative should also be required to account for actions he took before being confirmed as succession representative.²²⁷

The succession representative's accounting obligation is somewhat better defined than that of the mandatory. The succession representative is required to file accounts with the court annually "and at any other time when ordered by the court on its own motion or on the application of any interested person."²²⁸ The succession representative is also obligated to file a final account.²²⁹ The accounting obligation of an independent succession representative is somewhat different because annual accounts are not generally required; however, "any person interested in the estate may demand an annual accounting" in the same manner as demanding an accounting from a regular succession representative.²³⁰ Upon the "application of any interested person," the court may also "require an independent [succession representative] to furnish accountings at more frequent intervals."²³¹ If the succession representative dies or is interdicted, "an account of his administration may be filed by his heirs or by his legal representative; and upon the petition of an interested party, the

225. See *In re Succession of Ferguson*, 114 So. 3d 1260, 1264 (La. Ct. App. 2d Cir. 2013); *Langendorf v. Adm'rs of Tulane Educ. Fund*, 361 So. 2d 905, 908–10 (La. Ct. App. 4th Cir. 1978); *Succession of Hearn*, 412 So. 2d 692, 700 (La. Ct. App. 2d Cir. 1982).

226. See *Succession of Granger v. Worthington*, 829 So. 2d 1108, 1110–11 (La. Ct. App. 3d Cir. 2002); *Succession of Moore*, 737 So. 2d 749, 756 (La. Ct. App. 4th Cir. 1998).

227. See *Granger*, 829 So. 2d at 1110–11; *Moore*, 737 So. 2d at 756.

228. LA. CODE CIV. PROC. art. 3331 (2018).

229. *Id.* art. 3332.

230. *Id.* art. 3396.17.

231. *Id.*

court shall order the filing of such an account.”²³² The term “interested person” generally refers to any person with an interest in the decedent’s property, such as an heir, legatee, creditor, trustee, or beneficiary of a trust.²³³ Given that a court could also raise the issue on its own motion, courts ought to give the term a broad and liberal construction.

Once the succession representative has rendered an accounting, an “opposition . . . may be filed at any time before homologation,” and it “shall be tried as a summary proceeding.”²³⁴ The burden of proving “the correctness of every item in the account” is on the succession representative.²³⁵ Once a court has issued a judgment homologating an account, the burden changes: “A judgment homologating any account other than a final account shall be *prima facie* evidence of the correctness of the account.”²³⁶ Moreover, “[a] judgment homologating a final account has the same effect as a final judgment in an ordinary action.”²³⁷ A final account may cover issues already addressed in an annual account. If the court has already homologated the annual account, then issues covered by that account are considered *prima facie* correct, and the burden is on the party challenging them in the final account.²³⁸

3. Removal of Succession Representative

A succession representative may be removed upon the motion of any interested party or by the court on its own motion.²³⁹ The procedure and grounds for removal are essentially the same for independent succession representatives and those subject to ordinary administration.²⁴⁰ Removal requires a contradictory hearing and can be a summary proceeding.²⁴¹

The party seeking removal has the burden of proof, and “the trial court is vested with discretion in determining whether removal of a succession

232. *Id.* art. 3338.

233. Succession of Benoit, 199 So. 625, 631–32 (La. 1940) (heirs); *In re* Succession of Lowe, No. 2017-CW-0554, 2017 WL 3404959 (La. Ct. App. 1st Cir. Aug. 9, 2017) (trust beneficiaries).

234. LA. CODE CIV. PROC. art. 3336.

235. Succession of Goffinet, 565 So. 2d 951, 952 (La. Ct. App. 5th Cir. 1990).

236. LA. CODE CIV. PROC. art. 3337.

237. *Id.*

238. *See In re* Succession of Ballex, No. 2015-CA-1647, 2016 WL 1535070, at *3 (La. Ct. App. 1st Cir. Apr. 15, 2016).

239. LA. CODE CIV. PROC. art. 3182.

240. *See id.* art. 3396.20.

241. *Id.* arts. 3182, 3396.20.

representative is appropriate under the particular facts.”²⁴² The moving party must “prove by convincing evidence that the representative either breached his fiduciary duty to the succession under Louisiana Code of Civil Procedure article 3191 or the existence of one of the grounds for removal enumerated in Louisiana Code of Civil Procedure article 3182.”²⁴³ Generally, courts have not specified whether “convincing evidence” is more similar to a preponderance of the evidence or clear and convincing evidence.

If the plaintiff’s grounds for removal are proven, the court is not necessarily required to remove the succession representative. Rather, the trial court “is vested with discretion to determine whether removal is appropriate under the facts of the particular case.”²⁴⁴ On appeal, the trial court’s decision is reviewed for abuse of discretion.²⁴⁵

The Code of Civil Procedure sets forth a number of grounds for removal. Article 3182 allows removal of “any succession representative who is or has become disqualified” or who “has become incapable of discharging the duties of his office.”²⁴⁶ Removal is likewise permitted if the succession representative “has mismanaged the estate” or “has failed to perform any duty imposed by law or by order of court.”²⁴⁷ Finally, removal may be appropriate if the succession representative “has ceased to be a domiciliary of the state without appointing an agent as provided in article 3097(4), or has failed to give notice of his application for appointment when required under article 3093.”²⁴⁸

Usually, courts liberally construe the timing issues suggested by article 3182’s use of present perfect verb tenses. In some cases, the reasons a succession representative ought to be removed existed when he was appointed, and had a party raised them, the party could have prevented the initial appointment.²⁴⁹ The courts’ liberal reading of the statute appropriately affords some additional discretion in these situations. Courts routinely appoint succession representatives without a hearing and without

242. *In re Succession of Dean*, 247 So. 3d 746, 763 (La. Ct. App. 1st Cir. 2018).

243. *Id.* at 762; *accord Succession of Brazan*, 975 So. 2d 53, 56 (La. Ct. App. 5th Cir. 2007).

244. *Brazan*, 975 So. 2d at 56.

245. *Id.* at 56–57; *Dean*, 247 So. 3d at 763.

246. LA. CODE CIV. PROC. art. 3182.

247. *Id.*

248. *Id.*

249. *E.g.*, *Succession of Luwisch*, 675 So. 2d 799, 801–02 (La. Ct. App. 4th Cir. 1996) (executor removed due to his poor management skills and lack of education, which were circumstances that existed at the time of his initial appointment).

giving all interested parties an opportunity to be heard, all of which is permitted by the Code of Civil Procedure. The Code of Civil Procedure does not, however, provide a clear method for interested parties to later challenge the initial appointment of a succession representative. A liberal construction of article 3182 provides a practical approach by allowing removal on the basis of issues that existed at the time of the initial appointment.

All but two grounds for removal are discussed in more detail in the sections below. Omitted are a nondomiciliary's failure to appoint an agent and the failure to give notice of application for appointment as succession representative. Those two grounds are reasonably straightforward and rarely give rise to significant controversy.

a. Succession Representative Has Become Disqualified

A succession representative may be removed if he becomes disqualified.²⁵⁰ Grounds for disqualification are largely based on tutorship and interdiction, which may provide some useful analogies. Disqualifications include: (1) interdiction or proven mentally incompetent after a contradictory hearing; (2) conviction of a felony; and (3) proven unfit for appointment because of bad moral character after a contradictory hearing.²⁵¹ A handful of other disqualifications exist—for example, minority—but they are more likely to disqualify a person from initial appointment rather than subsequent removal.²⁵² Felony conviction and interdiction should be straightforward matters to prove in a removal action by introducing court records or similar evidence. Interestingly, courts have occasionally shown a somewhat lenient attitude toward certain felony convictions as a basis for removal.²⁵³

Mental incompetence, in the absence of an interdiction proceeding, and bad moral character are more nuanced issues. Unfortunately, few Louisiana cases have considered these grounds for removal.²⁵⁴ In the tutorship context, Planiol described incapacity as “inefficiency and want of judgment in the conduct of business due to want of intelligence or

250. LA. CODE CIV. PROC. art. 3182.

251. *Id.* art. 3097.

252. *Id.*

253. *See* Succession of Bernstine, 879 So. 2d 411, 413 (La. Ct. App. 3d Cir. 2004); Succession of Thomas, 596 So. 2d 348, 352 (La. Ct. App. 3d Cir. 1992). Compelling arguments could be made in support of a lenient attitude depending on the felony in question.

254. *Thomas*, 596 So. 2d at 352.

will.”²⁵⁵ Given the proximity of the term “mentally incompetent” to the term “interdiction” in Code of Civil Procedure article 3097, disqualifying mental incompetence likely also includes persons with intellectual or cognitive deficiencies that would affect the ability to discharge the duties of the office. For example, a person with diminished mental acuity due to Alzheimer’s disease or a traumatic brain injury might be disqualified for mental incompetence. In some instances, removal for mental incompetence will overlap with removal for being incapable under Louisiana Code of Civil Procedure article 3182, discussed in more detail below.

Bad moral character seems like a curious legal standard in the modern era. Prior Civil Code articles likened bad morals to “notorious misbehavior”²⁵⁶ and “[p]ersons of a conduct notoriously bad.”²⁵⁷ The majority of the Louisiana cases considering the standard do so in the tutorship context and are generally unhelpful in the modern era.²⁵⁸ *Succession of Horrell* is one of the only cases to consider the alleged bad morals of a succession representative.²⁵⁹ This case suggests that bad moral character includes “the traditional types of behavior or previous bad acts which would indicate that one is not fit to assume the responsibilities of administrator of a succession.”²⁶⁰ The decision provides no citation for that proposition, but it does seem like a reasonable interpretation of the phrase in the successions context.

Succession of Horrell went further and explained that bad moral character was not strictly limited to “traditional types of behavior or previous bad acts.”²⁶¹ The court found that the decedent’s son, an attorney in good standing, should be disqualified as succession representative because of the “extraordinary amount of animosity between the family members” and the son’s involvement in getting his mentally incompetent father to execute a will.²⁶² Although not mentioned by the court, the holding aligns nicely with Civil Code article 1481, which prohibits a

255. PLANIOL, *supra* note 41, § 1845.

256. *Id.*

257. LA. CIV. CODE art. 303, *repealed by* Act 1960, No. 30, § 2, effective Jan. 1, 1961.

258. *See, e.g.*, *Succession of Le Blanc*, 37 La. Ann. 546, 548–49 (La. 1885) (equating notorious bad conduct to nonmarital sex); *Succession of Tate*, 123 So. 590, 591 (La. 1929) (mother was unfit tutor of her children because she had interracial romantic relationships).

259. *Succession of Horrell*, 709 So. 2d 1069, 1071 (La. Ct. App. 4th Cir. 1998).

260. *Id.*

261. *Id.*

262. *Id.*

person who “commits fraud or exercises duress or unduly influences a donor” from serving in a fiduciary capacity. From a practical standpoint, proving fraud, duress, or undue influence under Civil Code article 1481 is a difficult and sometimes time-consuming process. The *Succession of Horrell* approach allows a court to go ahead and remove a succession representative before an actual trial on the merits of the fraud, duress, or undue influence claims. If the court has some credible evidence of fraud, duress, or undue influence on the part of a succession representative, then the court is reasonable in deciding that the succession representative should be removed because of bad moral character. A similar approach and rationale might also be applicable in cases involving unworthiness and ingratitude.²⁶³

*Succession of Thomas*²⁶⁴ is a less sound decision. The succession representative was accused of bad moral character because of a recent arrest for criminal mischief, two prior criminal convictions for simple battery, and her “fail[ure] to report pertinent information to welfare authorities.”²⁶⁵ The court, however, did not believe that these facts were sufficiently severe to disqualify her from serving as succession representative.²⁶⁶ The case seems wrongly decided in light of the succession representative’s criminal convictions. On the other hand, our evolving views about incarceration relating to minor drug offenses, the racial dynamics of the criminal justice system, and the movement to restore rights to felons who have served their time might warrant a more lenient approach.

Succession of Bernstine also involved an unsuccessful attempt to disqualify a succession representative due to bad moral character.²⁶⁷ The plaintiffs alleged that the succession representative stole Christmas presents from his mother’s house to buy money for drugs, used marijuana, and had various drug related arrests and convictions.²⁶⁸ Little evidence was offered in support of the allegations.²⁶⁹ Even if proven, courts ought to resist characterizing a person suffering from an addiction as having bad moral character. The courts could just as easily remove such a person on the less stigmatizing basis of being incapable to discharge the duties of office.

263. See LA. CIV. CODE arts. 940–46 (2018) (unworthiness); *id.* arts. 1556–60 (ingratitude).

264. *Succession of Thomas*, 596 So. 2d. 348 (La. Ct. App. 3d Cir. 1992).

265. *Id.* at 352.

266. *Id.*

267. *Succession of Bernstine*, 879 So. 2d 411, 413 (La. Ct. App. 3d Cir. 2004).

268. *Id.*

269. *Id.*

b. Succession Representative Has Become Incapable of Discharging the Duties of His Office

The court may remove a succession representative upon a showing that he “has become incapable of discharging the duties of his office.”²⁷⁰ The handful of cases that have considered this basis for removal suggest that it has potential utility due to its broad scope. In *Succession of Luwisch*, the decedent’s husband was removed as executor because he lacked the requisite skills, training, and education.²⁷¹ The court emphasized that “lack of education and training alone do not form the basis for . . . removal.”²⁷² The lack of education and training does, however, “help[] to determine whether he has the skills to properly manage the estate.”²⁷³ Taken together, those facts supported a finding that the succession representative was incapable of discharging the duties of his office. The decision does not describe the facts in the case in depth other than referencing the husband’s decision to initiate a bankruptcy proceeding and statements he made at trial, such as: “I can’t remember if I’m living half of the time.”²⁷⁴ Nonetheless, the case illustrates that this basis may allow removal of a succession representative suffering from a mental decline without the necessity of adjudicating him mentally incompetent. It could also allow removal on the grounds of poor financial skills.

In *Succession of Moses*, the executor was under indictment for first degree murder of the decedent, her husband.²⁷⁵ The court removed her as executor because she could not properly administer the estate while she was incarcerated and awaiting trial.²⁷⁶ As the court explained: “The test is, considering all of the circumstances, whether such incarceration has in fact adversely affected the representative’s ability to serve to the detriment of the succession. The record shows that the property of the succession has not been well-maintained during Mrs. Moses’ administration.”²⁷⁷ Despite the court’s apparently generous view of murder indictments, it seems obvious that a murder indictment—particularly one relating to the decedent—ought to be evidence of either bad moral character or a conflict of interest sufficient to warrant removal. In any event, the rationale of *Succession of Moses* could extend to other cases in which some practical

270. LA. CODE CIV. PROC. art. 3182 (2018).

271. *Succession of Luwisch*, 675 So. 2d 799, 802 (La. Ct. App. 4th Cir. 1996).

272. *Id.* at 801.

273. *Id.*

274. *Id.* at 802.

275. *Succession of Moses*, 361 So. 2d 253, 253–54 (La. Ct. App. 1st Cir. 1978).

276. *Id.* at 254.

277. *Id.*

obstacle, like being out of the state or country for an extended period of time, prevents the succession representative from devoting sufficient time and attention to the administration.

Courts have recognized that a conflict of interest may cause a succession representative to become incapable of discharging the duties of his office. Some conflicts of interest may be unavoidable, particularly where the succession representative is also an heir, legatee, or creditor. These structural conflicts of interest do not necessarily require removal.²⁷⁸ If, however, “this conflict becomes such that it is actively tainting the administration of the succession, removal of the executor becomes necessary.”²⁷⁹

Succession of Robinson demonstrates a conflict of interest sufficient for removal.²⁸⁰ The decedent’s husband was initially appointed as succession representative, despite the fact that he and the decedent were in the middle of a contested divorce at the time of her death.²⁸¹ The husband owed alimony arrearages to the decedent that her succession representative would be expected to pursue and collect.²⁸² The decedent’s mother successfully sought removal of the husband as succession representative due to his conflict of interest with respect to the alimony arrearages.²⁸³ The court noted that a conflict of interest is not always grounds for removal of a succession representative.²⁸⁴ Given the facts of the case, however, the husband “cannot reasonably be expected to enforce diligently all obligations in the succession’s favor”; therefore, “his removal was justified . . . in that he is incapable of discharging the fiduciary duties of his office.”²⁸⁵

Removal on the basis of being incapable might also be useful when there is evidence that the succession representative has a bad moral character or is mentally incompetent. Concerned heirs and legatees may be hesitant to assert that the succession representative has a bad moral character or is mentally incompetent, particularly where the succession representative is a relative who would find such allegations offensive. The court might also be hesitant to make that stigmatizing finding on the record. The broader category of being deemed “incapable” may be a more

278. *Succession of Montgomery*, 452 So. 2d 297, 299 (La. Ct. App. 2d Cir. 1984); *Succession of Mangle*, 452 So. 2d 197, 200 (La. Ct. App. 3d Cir. 1984).

279. *Succession of Demarest*, 418 So. 2d 1368, 1374 (La. Ct. App. 4th Cir. 1982).

280. *Succession of Robinson*, 393 So. 2d 268, 269 (La. Ct. App. 1st Cir. 1980).

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 270.

palatable basis for removal in these circumstances. Individuals with poor financial management skills, poor physical or psychological health, or ongoing substance abuse issues might be removed under this catch-all category. Finally, removal for incapability might be appropriate when hostility between the succession representative and the heirs or legatees renders the succession representative unwilling or unable to communicate with the heirs or legatees.

c. Succession Representative Has Mismanaged the Estate

Mismanagement of the property under the succession representative's care is grounds for removal.²⁸⁶ A number of reported decisions involve the attempted—and sometimes successful—removal of a succession representative for mismanagement. Mismanagement usually involves some breach of fiduciary obligation by the succession representative. The Louisiana Supreme Court, relying heavily on common law authority, has described mismanagement as follows:

Also clear is the definition of the word “mismanage”, which simply means to manage badly, improperly or unskillfully. It connotes the commission of an act or the omission of a duty which redounds to the detriment of the estate; an act or omission usually amounting to misconduct or breach of trust to warrant removal.²⁸⁷

Evidence that the succession representative failed to administer the succession in the manner contemplated by the Code of Civil Procedure is usually evidence of mismanagement. Mismanagement often overlaps with “failure to perform any duty imposed by law,”²⁸⁸ a basis for removal discussed in more detail in the following section.

Courts have found mismanagement warranting removal in a variety of circumstances. In *Succession of Mangle*, the succession representative's failure to “contact the forced heirs concerning their entitlement to the forced portion or notify them of their grandmother's estate” constituted a breach of fiduciary duty justifying removal.²⁸⁹ In *Succession of LaFleur*, the succession representative was removed for ignoring the instructions of the will in order to benefit his own interest in a family company and for

286. LA. CODE CIV. PROC. art. 3182 (2018).

287. *Succession of Houssiere*, 174 So. 2d 521, 524–25 (La. 1965) (internal citations omitted); *accord Succession of Horrell*, 79 So. 3d 1162, 1166 (La. Ct. App. 4th Cir. 2011).

288. LA. CODE CIV. PROC. art. 3182.

289. *Succession of Mangle*, 452 So. 2d 197, 201 (La. Ct. App. 3d Cir. 1984).

engaging in other transactions that inured to his benefit and to the detriment of the succession.²⁹⁰ In *Succession of Dunham*, the succession representative was removed for mismanagement relating to conflicts of interest between her position as succession representative and as a director and officer of a related corporation.²⁹¹ The succession representative clearly breached her fiduciary obligations in allowing succession property to be sold to the corporation for far less than market value.²⁹²

Some courts are more forgiving of imprudent acts. In *Succession of Dean*, the independent executor improperly joined an action—in her capacity as executor—to challenge the decedent’s will.²⁹³ The court held that this action did not justify her removal, particularly in light of her otherwise competent administration of the estate and the “unsettled nature of the previous jurisprudence addressing the rights and duties of a succession representative to challenge the validity of the decedent’s will.”²⁹⁴ In a more dubious opinion, *Succession of McIntire*, the court allowed the executor to remain in office despite ample evidence showing that he failed to open a succession bank account, continued withdrawing and spending funds belonging to the decedent, failed to obtain needed appraisals, failed to file any accountings, failed to account for all of the succession’s assets, and paid debts without the required court approval.²⁹⁵

d. Succession Representative Has Failed to Perform Any Duty Imposed by Law or by Order of Court

The succession representative may be removed if he “has failed to perform any duty imposed by law or by order of court.”²⁹⁶ This includes a whole host of duties set forth in the Code of Civil Procedure. For example, the succession representative is under a duty to open a succession bank account and deposit funds therein;²⁹⁷ to “preserve, repair, maintain, and protect the property of the succession”;²⁹⁸ and to prepare and file various accountings, inventories, and descriptive lists.²⁹⁹

290. *Succession of LaFleur*, 752 So. 2d 237, 240 (La. Ct. App. 3d Cir. 1999).

291. *Succession of Dunham*, 408 So. 2d 888, 899 (La. 1981).

292. *Id.*

293. *Succession of Dean*, 247 So. 3d 746, 763–64 (La. Ct. App. 1st Cir. 2018).

294. *Id.*

295. *Succession of McIntire*, 785 So. 2d. 1032, 1039 (La. Ct. App. 4th Cir. 2001).

296. LA. CODE CIV. PROC. art. 3182 (2018).

297. *Id.* art. 3222.

298. *Id.* art. 3221.

299. *Id.* arts. 3131–37, 3331–35, 3396.17–.19.

Some generalizations can be made from the ample jurisprudence that considers this basis for removal. First, isolated failures to comply with statutorily prescribed duties usually will not constitute sufficient grounds for removal. For example, in *Succession of Linder*, the succession representative's failure to update the final tableau to reflect the receipt of royalty checks did not justify removal, particularly considering his overall prudent administration of the succession.³⁰⁰ On the other hand, repeated failures or particularly egregious failures do justify removal. In *Succession of LeBouef*, removal was warranted where co-administrators repeatedly failed to obtain the required prior court approval before selling succession property, paid themselves without prior court approval, and failed to deposit the decedent's funds into a succession bank account.³⁰¹ In *Succession of Cucchero*, removal was appropriate where the succession representative filed no accountings between 1996 and 2001.³⁰² Finally, a succession representative who fails to comply with a court order usually will—unsurprisingly—end up removed. The mere failure to file an annual account, for example, is not usually grounds for removal.³⁰³ Failing to render annual or final accounts in accordance with a court order or rendering deficient accounts in response to a court order to render accountings, however, will likely result in removal.³⁰⁴

4. Conversion of Independent Administration to Ordinary Administration

One additional remedy exists in the case of independent succession representatives: conversion to an ordinary proceeding. Louisiana Code of Civil Procedure article 3396.20 allows conversion “on the motion of any interested person” and following a “contradictory hearing” and a finding of “good cause.” Louisiana courts have not yet had much opportunity to consider the meaning of “good cause.” Presumably, good cause exists when there is reasonable doubt regarding the succession representative's prudent administration of the estate. Conversion to an ordinary administration may also be an appropriate interim measure while the court determines whether grounds exist for removal of the succession representative.

300. *Succession of Linder*, 92 So. 3d 1158, 1173 (La. Ct. App. 5th Cir. 2012).

301. *Succession of LeBouef*, 153 So. 3d 527, 535 (La. Ct. App. 1st Cir. 2014).

302. *Succession of Cucchero*, 845 So. 2d 450, 454 (La. Ct. App. 1st Cir. 2003).

303. See LA. CODE CIV. PROC. ANN. art. 3331 cmt. a (2018).

304. See *Succession of Helwick*, 622 So. 2d 823, 825 (La. Ct. App. 4th Cir. 1993).

5. Money Damages

The succession representative “shall be personally responsible for all damages resulting from his failure” to act as a prudent administrator.³⁰⁵ Louisiana courts clearly accept restoration damages as a measure of damages for a succession representative’s malfeasance.³⁰⁶ It is less clear whether courts will hold succession representatives liable for disgorgement-type damages or lost profit damages. These damages are available in a direct action against a mandatary³⁰⁷ and ought to be available in analogous cases involving succession representatives.

The succession representative may be held liable for failing to properly insure succession property. In *Succession of Vazquez*, the succession representative was held liable for succession property damaged during Hurricane Katrina because the succession representative failed to insure the property.³⁰⁸ It did not matter that the decedent had let the insurance lapse prior to his death: The succession representative, as a prudent administrator, was bound to insure the property.³⁰⁹ The succession representative may also be held liable for the “loss occasioned by negligence or misconduct of his agent or attorney.”³¹⁰ In *Succession of Hess*, the succession representative was held liable for succession funds that were misappropriated by his attorney.³¹¹

A succession representative can be held liable for failing to accurately value succession property. As a prudent administrator, the succession representative “is required to obtain knowledge of the value of the assets of the succession for various purposes.”³¹² In particular, “[a] succession representative has a legal obligation to secure the best price reasonably available as consideration for the conveyance of succession property.”³¹³ In *Scurria v. Hodge*, the succession representatives sold succession property for less than fair market value and were held liable for the discrepancy between the price of the sale and the actual fair market value of the property.³¹⁴ Similarly, in *Succession of Irving*, the succession

305. LA. CODE CIV. PROC. art. 3191 (2018).

306. *Scurria v. Hodge*, 720 So. 2d 460, 466 (La. Ct. App. 2d Cir. 1998).

307. *See* Section II.D.5.

308. *Succession of Vazquez*, 976 So. 2d 209, 213 (La. Ct. App. 4th Cir. 2008).

309. *Id.*

310. *Succession of Hess*, 205 So. 2d 74, 76 (La. Ct. App. 4th Cir. 1967).

311. *Id.*

312. *Scurria v. Hodge*, 720 So. 2d 460, 465 (La. Ct. App. 2d Cir. 1998).

313. *Succession of Irving*, 436 So. 2d 1263, 1265 (La. Ct. App. 1st Cir. 1983).

314. *Id.*

representative was held “liable for the difference in the market values at the time of the respective sales and the actual sales prices.”³¹⁵

6. Voiding Self-Dealing Transactions

Succession representatives are generally prohibited from engaging in self-dealing.³¹⁶ Self-dealing may, of course, be grounds for removal. Additional remedies are also available in some instances. If the succession representative engages in a prohibited self-dealing contract, the contract is “voidable,” and the succession representative is “liable to the succession for all damages resulting therefrom.”³¹⁷ Unfortunately, Louisiana courts have not considered this provision in much depth in recent years.

7. Forfeiture of Compensation

A succession representative is ordinarily entitled to reasonable compensation for his services.³¹⁸ If a succession representative has breached his fiduciary duties, the other parties may balk at compensating him. In some cases, an interested party may successfully petition the court to reduce or deny compensation to the succession representative. The Code of Civil Procedure does not directly contemplate a denial or reduction of compensation in cases of succession representative malfeasance. The Louisiana Supreme Court, however, has held that compensation can be denied in appropriate cases,³¹⁹ a position that lower courts have reaffirmed.³²⁰

8. Penalties Relating to Succession Bank Accounts

The succession representative is required to utilize what is often called a “succession bank account.” Specifically, he is required to “deposit all moneys collected by him as soon as received in a bank account in his official capacity, in a state or national bank in this state, and shall not withdraw the deposits or any part thereof, except in accordance with law.”³²¹ Failure to comply with this obligation can result in significant

315. *Id.*

316. LA. CODE CIV. PROC. arts. 3194–95 (2018).

317. *Id.* art. 3194.

318. *Id.* art. 3351.

319. LA. CODE CIV. PROC. ANN. art. 3351 cmt. h (2018).

320. *See* Succession of Vazquez, 976 So. 2d 209, 215 (La. Ct. App. 4th Cir. 2008).

321. LA. CODE CIV. PROC. art. 3222.

penalties: “[T]he court may render a judgment against the succession representative and his surety in solido to the extent of twenty percent interest per annum on the amount not deposited or withdrawn without authority, such sum to be paid to the succession.”³²² The court may also hold him “liable for all special damage suffered.”³²³ In applying this penalty, Louisiana courts have held that the penalty should not be imposed unless there is also a finding of bad faith or intentional wrongdoing on the part of the succession representative.³²⁴

E. Prescription

The general rules of prescription for actions relating to breach of fiduciary obligations by a succession representative are comparable to the rules in the mandatory setting. Generally, causes of action arising out of the succession representative’s breach of fiduciary obligations are personal actions subject to the 10-year prescriptive period.³²⁵ Of course, the courts have not always been consistent on this point, and there is some confusion in the jurisprudence.³²⁶

Interestingly, courts have essentially extended the scope of a succession representative’s obligations—and the 10-year prescriptive period—to acts that took place before the succession representative was confirmed as such on the theory that the succession representative had a duty to recover the funds once confirmed.³²⁷ This “tacking” of prescription can be particularly helpful in cases where the malfeasance of a mandatory is not discovered until after the death of the principal. Prescription tacking is also helpful where the succession representative engaged in some wrongful act prior to having any authority as a fiduciary.

In *Succession of Granger v. Worthington*, the decedent’s cousin, Worthington, withdrew funds from various bank accounts following the decedent’s death but prior to Worthington’s appointment as succession representative.³²⁸ The bank accounts were jointly titled in the names of the

322. *Id.*

323. *Id.*

324. *E.g.*, *Succession of Cook*, 244 So. 3d 686, 690 (La. Ct. App. 2d Cir. 2017); *Succession of Hess*, 205 So. 2d 74, 77 (La. Ct. App. 4th Cir. 1967).

325. *Fuller v. Baggette*, 847 So. 2d 26, 34 (La. Ct. App. 2d Cir. 2003); *Succession of Granger v. Worthington*, 829 So. 2d 1108, 1110 (La. Ct. App. 3d Cir. 2002).

326. *E.g.*, *Manion v. Pollingue*, 524 So. 2d 25, 32 (La. Ct. App. 3d Cir. 1988).

327. *See Granger*, 829 So. 2d at 1110–11; *Succession of Moore*, 737 So. 2d 749, 756 (La. Ct. App. 4th Cir. 1998).

328. *Granger*, 829 So. 2d at 1110–11.

decedent and Worthington, but the funds belonged to the succession.³²⁹ Once Worthington's misappropriation of the funds came to light, she agreed to resign as succession representative, and her successor representative sought the funds' return to the estate.³³⁰ Worthington argued that any claim against her had prescribed and pointed out that she was not acting as succession representative when she took the funds.³³¹ The court disagreed. Once Worthington was appointed as succession representative, she had a fiduciary obligation to pursue any misappropriated funds, including the ones she had misappropriated, prior to her appointment.³³² Her failure to do so constituted a breach of her fiduciary duty as succession representative and was subject to the 10-year prescriptive period.³³³

1. Louisiana Revised Statutes § 9:5621: Two-Year Prescription for Certain Actions Against Succession Representative

Louisiana Revised Statutes § 9:5621 provides that actions "arising out of any act of the succession representative, as such, may have done or failed to do, are prescribed by two years reckoning from the day of the judgment homologating the final account."³³⁴ The statute goes on to explain that this two-year prescriptive period "does not apply to actions for the recovery of any funds or other property misappropriated by the succession representative nor to actions for any amount not paid in accordance with the proposed payments shown on the final account."³³⁵ Rather, such actions are subject to the 10-year prescriptive period.³³⁶

Jurisprudence interpreting the statute has generally given it a narrow scope, particularly where the narrow scope benefits the injured party by allowing a longer prescriptive period. Louisiana courts are in general agreement that the statute does not apply to claims for breach of fiduciary obligation.³³⁷ Those claims remain subject to a 10-year prescriptive

329. *Id.* at 1109.

330. *Id.* at 1109–10.

331. *Id.* at 1110.

332. *Id.* at 1110–11.

333. *Id.*

334. LA. REV. STAT. § 9:5621 (2018).

335. *Id.*

336. Succession of Moore, 737 So. 2d 749, 756 (La. Ct. App. 4th Cir. 1998).

337. Winder v. George, No. 2007 CA 0314, 2007 WL 4532139, at *9 (La. Ct. App. 1st Cir. 2007); Fuller v. Baggette, 847 So. 2d 26, 34 (La. Ct. App. 2d Cir. 2003); Granger, 829 So. 2d at 1110.

period.³³⁸ The cases have done little, however, to explain exactly which actions are subject to the two-year prescriptive period.

*Succession of Raziano*³³⁹ is an anomaly and likely a result-driven decision that is best explained by the court's desire to allow a suit to proceed. The succession representative claimed that he was robbed when he had succession cash in hand.³⁴⁰ His story was not very credible, and it seemed more likely that he simply kept the money for himself.³⁴¹ The decedent's heirs brought suit seeking a return of the funds, as well as a 20% penalty for failure to deposit the funds in a succession bank account—a suit that seems to fall squarely within the definition of misappropriation or breach of fiduciary duty, or both.³⁴² More than 10 years had elapsed since the disappearance of the funds, meaning that any personal action had prescribed.³⁴³ The court, however, had not yet homologated the final account, meaning that the two-year prescriptive period had not yet elapsed.³⁴⁴ The court held that the action was subject to the two-year period on the theory that the heirs' suit “was not one for misappropriation of funds.”³⁴⁵ Rather, the court said that “it was a claim based on malfeasance . . . for failure to perform his fiduciary duty, i.e., deposit and maintain the succession funds in a state or national bank in an official succession account and *not* to withdraw same except in accordance with law.”³⁴⁶

2. Louisiana Revised Statutes § 9:5632: Two-Year Prescription for Defects in Alienation, Encumbrance, or Leases

Louisiana Revised Statutes § 9:5632 sets forth another special two-year prescriptive period that allows a party to set aside certain transactions when the succession representative lacked the requisite authority:

When the legal procedure is defective or does not comply with the requisites of law in the alienation, encumbrance, or lease of movable or immovable property made by a legal representative of a succession, minor, or interdict, provided an order of court has

338. See *Fuller*, 847 So. 2d at 34; *Granger*, 829 So. 2d at 1110.

339. *Succession of Raziano*, 538 So. 2d 1136 (La. Ct. App. 5th Cir. 1989).

340. *Id.* at 1137.

341. See *id.*

342. *Id.* at 1138.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

been entered authorizing such alienation, encumbrance, or lease, any action shall be prescribed against by those claiming such defect or lack of compliance after the lapse of two years from the time of making such alienation, encumbrance, or lease.³⁴⁷

The rule also applies to independent succession representatives “provided an order of court has been entered authorizing independent alienation”³⁴⁸ This rule is intended for the protection of third parties. It should not preclude a suit for damages for breach of a fiduciary duty by a succession representative, so long as the suit is brought within 10 years. Rather, the statute limits the time frame for voiding the unauthorized transaction.

IV. TRUSTEES

The fiduciary obligations of Louisiana trustees are quite similar to the fiduciary obligations of mandataries, succession representatives, and curators or tutors. If the beneficiary believes that the trustee has breached his fiduciary obligations, the Louisiana Trust Code sets out a variety of remedies.

A. Parties to Trustee Litigation

1. Parties to Litigation Against a Trustee

The beneficiary of a trust or his legal representative is the proper party to bring suit against the trustee.³⁴⁹ A settlor who has retained an interest in an inter vivos trust as a beneficiary has the same rights. A settlor who has retained rights in a trust—though perhaps not as a beneficiary—might also have standing to bring suit against the trustee in some circumstances.³⁵⁰ The trustee is the proper defendant in an action brought against him relating to his administration of the trust.

2. Suits by Beneficiaries Against Third Parties

The trustee is “the proper plaintiff to sue to enforce a right of the trust estate.”³⁵¹ If, however, the trustee is unable or unwilling to bring suit, a

347. LA. REV. STAT. § 9:5632 (2018).

348. *Id.*

349. See LA. CODE CIV. PROC. art. 681 (2018); LA. REV. STAT. § 9:2221.

350. See *Holzhauser v. Fagan*, 363 So. 2d 1232, 1235 (La. Ct. App. 4th Cir. 1978).

351. LA. CODE CIV. PROC. art. 699.

beneficiary may bring suit directly to protect his rights. Section 2222 of the Trust Code provides that the beneficiary:

[M]ay sue to enforce [a right of the trust estate], in order to protect his own interest, in an action against: (1) A trustee and an obligor, if the trustee improperly refuses, neglects, or is unable for any reason, to bring an action against the obligor; or (2) An obligor, if there is no trustee or the trustee cannot be subjected to the jurisdiction of the proper court.³⁵²

The purpose of § 2222 is a practical one, and a similar approach is taken in other jurisdictions.³⁵³ If the trustee cannot—or will not—act, then the cause of action might prescribe before the beneficiary can successfully sue to compel the trustee to act or bring other remedial action.³⁵⁴ Likewise, the obligor may become insolvent during the time delay in which the beneficiary seeks remedial action against the trustee.³⁵⁵ Section 2222 also affords relief to the beneficiary when the trustee is responsible for malfeasance when serving in a different fiduciary or personal capacity. Some jurisdictions will apparently allow the beneficiary and the trustee to join together to bring suit against third parties.³⁵⁶ Thus far, Louisiana courts have not permitted this approach.³⁵⁷

B. Venue

Trust litigation must usually be brought in the “proper court.” This term is defined by reference to a detailed set of rules in § 2235 of the Trust Code. These jurisdictional rules are fairly clear and have not given rise to much litigation.

Section 2235 generally recognizes the enforceability of forum selection clauses in trust instruments. Forum selection clauses in inter vivos trusts are immediately effective.³⁵⁸ Forum selection clauses in mortis causa trusts, however, are only effective “after the trustee is put into possession of the entire legacy.”³⁵⁹ Prior to that time, venue is proper in the court that has jurisdiction over the succession. The Trust Code also

352. LA. REV. STAT. § 9:2222.

353. See BOGERT & BOGERT, *supra* note 29, § 869.

354. See *id.*

355. *Id.*

356. *Id.*

357. See *Huber v. Calcasieu Marine Nat'l Bank of Lake Charles*, 262 So. 2d 404, 407 (La. Ct. App. 3d Cir. 1972).

358. LA. REV. STAT. § 9:2235 (2018).

359. *Id.*

allows parties to override the default rules and forum selection clauses by consent: “[T]he proper court shall be any court agreed to by all trustees, beneficiaries, and living settlors.”³⁶⁰

The jurisdiction and venue rules of § 2235 have not given rise to much controversy. Two cases, however, provide some additional insight. *In re Dendinger* explained a rule that should be obvious: The term “proper court” does not mean the exact same division of a district court.³⁶¹ As the court stated: “It is well settled in Louisiana law that each judicial district constitutes a single court.”³⁶² Although some judicial districts have multiple divisions, those divisions do “not operate to sever a single district court into multiple courts.”³⁶³ Accordingly, “nothing in the Louisiana Trust Code requires a petition for instructions to be considered by the same section or division of court that conducted the succession proceedings.”³⁶⁴

Marston v. Premier Bank, N.A., is more significant.³⁶⁵ That case demonstrated that in litigation with multiple theories of recovery—for example, traditional trust theories and tort theories—the venue and jurisdiction supplied by the “proper court” rules of § 2235 may override other possible venue and jurisdiction rules. Generally, “suits instituted on different theories of recovery may be brought in the venue which is proper for any theory alleged in the suit.”³⁶⁶ The court recognized that trusts constitute an “exception to this rule” and noted that “[e]ven if other actions are joined with a suit against the trustee for removal and/or breach of trust, the Trust Code requires the action to be brought in the ‘proper court’”³⁶⁷

C. Types of Proceedings and Related Issues

The Trust Code generally permits actions relating to trusts to be tried as summary proceedings. Certain factual or procedural scenarios, however, may require a different type of proceeding.

360. *Id.*

361. *In re Dendinger*, 766 So. 2d 554, 555–56 (La. Ct. App. 4th Cir. 1999).

362. *Id.* (internal citations omitted).

363. *Id.* (internal citations omitted).

364. *Id.*

365. *Marston v. Premier Bank, N.A.*, 665 So. 2d 725 (La. Ct. App. 2d Cir. 1995).

366. *Id.* at 728.

367. *Id.*

1. General Rule: Summary Proceeding

Many actions relating to trusts and their administration may be brought as summary proceedings. Section 2231 of the Trust Code provides: “If a cause or right of action accrues to a beneficiary against a trustee or a settlor or both, to a trustee against a beneficiary or a settlor or both, or to a settlor against a beneficiary or a trustee or both, the action may be by summary proceeding.”³⁶⁸

2. Other Types of Proceedings

There are a handful of exceptions to the default rule allowing summary proceedings. The nature of the relief sought might require a different type of proceeding. For example, the Trust Code contemplates that injunctive relief might be an appropriate remedy in some circumstances.³⁶⁹ If injunctive relief is sought, then the Code of Civil Procedure articles relating to injunctive relief govern the proceeding.³⁷⁰

If a party is seeking instructions from the court relating to a trust, then there are additional procedural options. Trust Code § 2233 provides that a “[a] trustee, a beneficiary, or a settlor in an ordinary or a summary proceeding may apply to the proper court for instructions concerning the trust instrument, the interpretation of the instrument, or the administration of the trust.”³⁷¹ Summary proceedings are usually faster and less expensive; therefore, they are preferable to ordinary proceedings in most cases.

The trustee has the additional option of seeking instructions via “ex parte proceedings.”³⁷² There is a downside to this option, however. Instructions issued by a court pursuant to a summary or ordinary proceeding “shall be full authority to act in accordance thereunder, and a trustee shall be fully protected from all claims of any person who has or who may subsequently acquire an interest in the trust property.”³⁷³ In contrast, instructions obtained via an ex parte proceeding “will protect a third party relying on the order, but will not exonerate a trustee from liability to a settlor or a beneficiary.”³⁷⁴ The purpose of the ex parte

368. LA. REV. STAT. § 9:2231 (2018).

369. *Id.* §§ 9:2221; 9:2232.

370. *Id.* § 9:2232; *accord* Fryar v. Westside Habilitation Ctr., Inc., 425 So. 2d 804, 804 (La. Ct. App. 3d Cir. 1982).

371. LA. REV. STAT. § 9:2233.

372. *Id.*

373. *Id.*

374. *Id.*

proceeding “is to enable the trustee to deal efficiently with third persons pursuant to instructions so obtained ex parte, but without prejudice to the rights of the settlor or beneficiary to hold the trustee liable for breach of his trust in such regard.”³⁷⁵ For that reason, ex parte proceedings are usually ill-advised in disputes between the beneficiary and the trustee.

D. Remedies Available: Instructions and Injunctions

Two useful remedies in the trust setting are instructions and injunctions. As explained in more detail below, instructions and injunctions might be sought by the trustee, the beneficiary, the settlor, or a third party. In this respect, instructions and injunctions are more than just remedies. They are useful tools that may serve a variety of purposes in the trust setting.

1. Instructions

The settlor, the trustee, or the beneficiary “may apply to the proper court for instructions concerning the trust instrument, the interpretation of the instrument, or the administration of the trust.”³⁷⁶ As explained above, the application may be by ordinary or summary proceeding, and the application of the trustee may also be ex parte. Jurisprudence reveals that the application for instructions might be styled in a variety of manners, including as a “petition for declaratory judgment,”³⁷⁷ a “petition for instructions,”³⁷⁸ or an “application for instructions.”³⁷⁹

Reported decisions and secondary sources provide many helpful illustrations of when an application for instructions might be appropriate, and courts should be generous in allowing such applications.³⁸⁰ Louisiana cases, for example, have considered questions relating to whether a particular individual is a beneficiary,³⁸¹ whether a party is entitled to

375. *In re Gulf Oxygen Welder’s Supply Profit Sharing Plan & Tr. Agreement*, 297 So. 2d 663, 667 (La. 1974).

376. LA. REV. STAT. § 9:2233.

377. *E.g.*, *Dawson v. Dorignac*, No. 17–316, 2017 WL 9916475, at *2 (La. Ct. App. 5th Cir. 2017).

378. *E.g.*, *In re Eleanor Pierce (Marshall) Stevens Living Tr.*, 229 So. 3d 36, 40 (La. Ct. App. 3d Cir. 2017); *In re Robert P. Breazeale, Jr., Tr.*, 2016 CA 1003, 2017 WL 3573991, at *1 (La. Ct. App. 1st Cir. 2017).

379. *Scott v. Am. Tobacco Co.*, 195 So. 3d 624, 628 (La. Ct. App. 4th Cir. 2016).

380. *E.g.*, BOGERT & BOGERT, *supra* note 29, § 559.

381. *Scott*, 195 So. 3d at 628. Some unpublished decisions are also relevant. *E.g.*, *Dawson*, 2017 WL 9916475; *Breazeale, Jr.*, 2017 WL 3573991, at *2–4.

various documents relating to the trust,³⁸² questions of attorney–client privilege,³⁸³ questions of the term of a trust,³⁸⁴ and whether a beneficiary’s actions implicated a no-contest provision.³⁸⁵

The Louisiana Supreme Court considered the constitutionality and meaning of the instruction remedy in some detail in *Gulf Oxygen Welder’s Supply Trust*.³⁸⁶ First, the trustee may apply for instructions “only if there is reasonable doubt as to his duties or powers as trustee.”³⁸⁷ Second, the trustee “is not entitled to instructions as to questions which may never arise or which may arise in the future but which have not yet arisen, or as to matters resting within his discretion.”³⁸⁸ At least one court has taken a liberal view of this requirement and held that the trustee did not abuse his discretion in seeking instructions on matters ultimately found to be within his discretion where the “action . . . was necessitated by the ongoing suspicion and lack of cooperation between the Trust’s second and third beneficiaries.”³⁸⁹ Third, the costs of seeking instructions are chargeable against the trust estate unless “the application for instructions is plainly unwarranted, so that it was improper for the trustee to incur such expense.”³⁹⁰ Fourth, any adversely affected beneficiaries ought to be parties to the proceeding, even if not strictly required by the statute, because “such instructions cannot be binding on the beneficiaries as against the trustee, where [the beneficiaries] have had no notice or opportunity to be heard.”³⁹¹ Unfortunately, *Gulf Oxygen Welder’s Supply Trust* did little to elaborate on these guidelines, and few other courts have considered the issues.

Gulf Oxygen Welder’s Supply Trust did not address whether or how the factors it set forth might differ if the party seeking instructions is the beneficiary or the settlor. For example, *Gulf Oxygen Welder’s Supply Trust* noted that the trustee could recover his expenses from the trust

382. *Scott*, 195 So. 3d at 628. Some unpublished decisions are also relevant. E.g., *Dawson*, 2017 WL 9916475, at *5–7.

383. *Eleanor Pierce*, 229 So. 3d at 40–41.

384. *Richards v. Richards*, 408 So. 2d 1209, 1211 n.4 (La. 1981).

385. *Hughes v. Burguières*, 276 So. 2d 267, 268 (La. 1973).

386. See generally *In re Gulf Oxygen Welder’s Supply Profit Sharing Plan and Tr. Agreement*, 297 So. 2d 663 (La. 1974).

387. *Id.* at 667.

388. *Id.*

389. *In re Abadie Inter Vivos Tr.*, 791 So. 2d 181, 189 (La. Ct. App. 4th Cir. 2001).

390. *Gulf Oxygen*, 297 So. 2d at 667.

391. *Id.*

estate.³⁹² Unclear from the decision is whether a settlor or beneficiary is entitled to a similar benefit. This important question is without a clear answer, and plausible arguments can be made either way. Louisiana has a jurisprudential approach, likely amounting to *jurisprudence constante*, that “[a]s a general rule, attorney fees are not allowed in Louisiana unless they are authorized by statute or provided for by contract.”³⁹³ Payment of the trustee’s attorneys’ fees is generally allowed by statute.³⁹⁴ The Trust Code, however, contains no comparable provisions relating to beneficiaries or settlors. In short, there appears to be no statutory authority allowing for recovery of attorneys’ fees by those parties.

On the other hand, the rationale behind Louisiana’s general prohibition of attorneys’ fees is not necessarily implicated in the usual application for instructions. The general prohibition stems from the view that attorneys’ fees are often penal in nature. They are “imposed not to make the injured party whole, but rather to discourage a particular activity on the part of the opposing party.”³⁹⁵ A beneficiary seeking payment of attorneys’ fees from the property of the trust, rather than from the trustee personally, would not necessarily punish the trustee. Moreover, the approach in other jurisdictions suggests that attorneys’ fees should be allowed if the litigation is beneficial to the trust.³⁹⁶

2. *Injunctive Relief*

The Trust Code specifically contemplates injunctive relief in two places—the effect of which can be somewhat confusing. As discussed in Sections II.D.2 and III.D.1 above, injunctive relief is generally permitted in Louisiana “in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by

392. *Id.*

393. *Langley v. Petro Star Corp.*, 792 So. 2d 721, 723 (La. 2001); *accord* *Huddleston v. Bossier Bank & Tr. Co.*, 475 So. 2d 1082, 1085 (La. 1985); *In re Mashburn Marital Trs.*, 52 So. 3d 1136, 1142 (La. Ct. App. 1st Cir. 2010).

394. Louisiana Revised Statutes § 9:2191 provides that the “trustee is entitled to indemnity from the trust estate for expenses properly incurred by him in the administration of the trust.” LA. REV. STAT. § 9:2191 (2018). Expenses incurred by the trustee who seeks instructions from the court normally fall within this indemnity. *See, e.g.*, *Favrot v. Favrot*, 115 So. 3d 1190, 1196 (La. Ct. App. 4th Cir. 2013) (noting that trustee is permitted to “incur litigation expenses, including attorney’s fees”).

395. *Langley*, 792 So. 2d at 723.

396. *See, e.g.*, UNIF. TRUST CODE § 1004 and accompanying comments.

law.”³⁹⁷ The Trust Code authorizes injunctive relief in general terms in § 2232:

If irreparable injury, loss, or damage will otherwise result, the injunctive relief authorized by Articles 3601 through 3613 of the Code of Civil Procedure may be granted to a beneficiary as against a trustee or a settlor or both, to a trustee against a beneficiary or a settlor or both, or to a settlor against a beneficiary or a trustee or both.³⁹⁸

This provision simply incorporates the default rules of injunctive relief found in the Code of Civil Procedure. In some cases, the irreparable injury standard will prohibit injunctive relief because some damages relating to trustee malfeasance are clearly pecuniary in nature.³⁹⁹

Section 2221 of the Trust Code also authorizes the beneficiary to seek injunctive relief in certain instances without a showing of irreparable harm: “A beneficiary of a trust may institute an action: (1) To compel a trustee to perform his duties as trustee; (2) To enjoin a trustee from committing a breach of trust; (3) To compel a trustee to redress a breach of trust; (4) To remove a trustee.”⁴⁰⁰ Relief sought under (1), (2), or (3) might take the form of injunctive relief depending on the facts and circumstances of the case. The jurisprudence offers little guidance on the procedural aspects of actions brought under § 2221. It is, however, readily understood by reference to other laws.

Where a beneficiary seeks injunctive relief under § 2221, a showing of irreparable harm is not required. Code of Civil Procedure article 3601 permits injunctions to issue without a showing of irreparable harm in “cases specifically provided by law.”⁴⁰¹ As Professor Maraist explains in his treatise, “[t]he ‘cases’ that fall within this category are statutes that provide for injunctive relief under certain circumstances.”⁴⁰² Section 2221 falls squarely within this category of statutes by authorizing injunctive relief for a beneficiary without requiring a showing of irreparable harm. This approach is also consistent with the common law and the law in other

397. LA. CODE CIV. PROC. art. 3601 (2018).

398. LA. REV. STAT. § 9:2232 (2018).

399. See *Hibernia Nat’l Bank v. Blossman*, 583 So. 2d 5, 5–7 (La. Ct. App. 4th Cir. 1991).

400. LA. REV. STAT. § 9:2221.

401. LA. CODE CIV. PROC. art. 3601.

402. Frank L. Maraist, *Civil Procedure-Special Proceedings*, in 1A LOUISIANA CIVIL LAW TREATISE § 1.2, 8 (2d ed. 2018).

states.⁴⁰³ Injunctive relief is an equitable remedy⁴⁰⁴ and, as such, one that is appropriately applied in the trust context without a showing of irreparable harm where there is an actual or threatened breach of fiduciary duty.⁴⁰⁵

E. Remedies Available: Beneficiary Actions Against the Trustee

The Trust Code allows the beneficiary to seek and obtain a number of remedies against the trustee: (1) to compel the trustee to perform his duties as trustee; (2) to enjoin the trustee from committing a breach of trust; (3) to compel a trustee to redress a breach of trust; and (4) to remove the trustee.⁴⁰⁶ Often, the beneficiary will seek multiple remedies in the same action, sometimes in the alternative.⁴⁰⁷ This approach is usually appropriate, and it is often important for purposes of avoiding prescription and ensuring judicial economy.

The appropriate procedure for these actions depends on the underlying relief sought. For example, a beneficiary might seek an injunction to prevent a trustee from committing a breach of trust, in which case the procedural rules governing injunctive relief apply. Alternatively, a beneficiary might want to bring an action to compel the trustee to render an accounting. This can usually be accomplished through a summary proceeding using either a petition or a rule to show cause against the trustee.⁴⁰⁸

1. Compelling the Trustee to Perform His Duties as Trustee

A beneficiary might sue to compel trustee performance of a number of duties. The suit may seek injunctive relief. A court order instructing the

403. BOGERT & BOGERT, *supra* note 29, § 861.

404. Maraist, *supra* note 402, § 1.2.

405. See Mark R. Caldwell, Elliott E. Burdette, & Edward L. Rice, *Winning the Battle and the War: A Remedies-Centered Approach to Litigation Involving Durable Powers of Attorney*, 64 BAYLOR L. REV. 435, 452 (2012); BOGERT & BOGERT, *supra* note 29, § 861.

406. LA. REV. STAT. § 9:2221 (2018).

407. See, e.g., *Martin v. Martin*, 663 So. 2d 519, 520 (La. Ct. App. 4th Cir. 1995) (involved a “petition for revocation of a trust, alternatively for removal of the trustee”); *Brown v. Schwegmann*, 861 So. 2d 862, 865 (La. Ct. App. 4th Cir. 2003) (suit for removal of trustee and damages).

408. See, e.g., *Grant v. Grant*, 734 So. 2d 68, 72 (La. Ct. App. 2d Cir. 1999) (“The Trust Code allows a beneficiary to institute an action to compel the trustee to perform his duties Plaintiff exercised this right by filing a rule for an accounting, and she obtained financial records for each year of the trust.”).

trustee to perform some duty, however, may also suffice. If the trustee fails to comply with a court order, additional remedies exist, including being held in contempt of court,⁴⁰⁹ being removed as trustee,⁴¹⁰ and being held liable for damages.⁴¹¹ The following discussion highlights some of the more common issues relating to nonperformance of a trustee's duties.

a. Furnishing Information

Tensions sometimes arise when the trustee and the beneficiary have difficulty communicating with each other.⁴¹² Communication issues might stem from underlying intrafamily dynamics and personality conflicts.⁴¹³ A beneficiary may, understandably, become suspicious of a trustee with whom he has a poor relationship or who is not responsive to communication requests. A trustee may become equally frustrated with a beneficiary who is overbearing or demanding. Yet the trustee is obligated to communicate with the beneficiary and to provide the beneficiary with information under certain circumstances. The communication obligation "is critical to the administration of a trust, because the beneficiaries must have the information in order to monitor the trustee and the decisions made with respect to trust property."⁴¹⁴

If a beneficiary is concerned about the administration of the trust, requesting information from the trustee is a logical first step. If the trustee refuses to provide the information requested, then the beneficiary could bring an action under § 2221 of the Trust Code to compel performance. A trustee could also be found in breach of his fiduciary duties for his refusal or failure to communicate with a beneficiary.

The scope of the trustee's duty to furnish information has not often been considered by Louisiana courts. At first blush, Louisiana seems to

409. See LA. CODE CIV. PROC. arts. 221–27 (2018); *Boyd v. Boyd*, 57 So. 3d 1169, 1178–79 (La. Ct. App. 1st Cir. 2011).

410. LA. REV. STAT. § 9:2221.

411. *Id.* § 9:2201.

412. See, e.g., *Albritton v. Albritton*, 622 So. 2d 709, 714 (La. Ct. App. 1st Cir. 1993) ("The evidence at the trial of this matter further established that over the last 13 years the relationship between Dr. Albritton [the trustee] and his son [the beneficiary] has deteriorated to the point where they only communicate through their respective attorneys."); *Martin v. Martin*, 663 So. 2d 519, 522 (La. Ct. App. 4th Cir. 1995) (trustee said he did not refuse to communicate with sister-in-law beneficiary "during rational times.").

413. See *supra* text accompanying note 412.

414. BOGERT & BOGERT, *supra* note 29, § 541.

take a conservative approach to the trustee's duty to furnish information compared to other jurisdictions. Section 2089 of the Trust Code provides:

A trustee shall give to a beneficiary upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and permit him, or a person duly authorized by him, to inspect the subject matter of the trust, and the accounts, vouchers, and other documents relating to the trust.⁴¹⁵

If this statute stood in isolation, it could imply that the trustee's duty is merely responsive in nature.

The modern trend in other jurisdictions is to make it clear that proactive disclosure is sometimes required.⁴¹⁶ The position adopted by the Uniform Trust Code (UTC), for example, puts the ball in the trustee's court: "A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."⁴¹⁷ The UTC specifies a number of instances where proactive disclosure is required, including advance notice "of any change in the method or rate of the trustee's compensation" and notice "that a formerly revocable trust has become irrevocable."⁴¹⁸

Although Louisiana has not enacted statutes similar to those of the UTC, such statutes are not necessary to impose an affirmative duty on a trustee to keep beneficiaries informed about the administration of the trust in Louisiana. A proactive duty already exists in Louisiana by virtue of the trustee's overarching obligations of prudence or care, loyalty, and good faith.⁴¹⁹

Louisiana courts have distinguished between the duty to provide information and the accounting duty. A trustee may be obligated to

415. LA. REV. STAT. § 9:2089.

416. UNIF. TRUST CODE § 813 (UNIF. LAW COMM'N 2000).

417. *Id.*

418. *Id.*

419. *See* LA. CIV. CODE art. 1759 (2018). Unfortunately, the jurisprudence and Louisiana Civil Law Treatise § 14:7 have failed to fully appreciate this point. It is, however, well recognized in analogous circumstances. *See, e.g.,* Langendorf v. Adm'rs of Tulane Educ. Fund, 361 So. 2d 905, 908–09, 910 (La. Ct. App. 4th Cir. 1978); Succession of Ferguson, 114 So. 3d 1260, 1264 (La. Ct. App. 2d Cir. 2013); Succession of Hearn, 412 So. 2d 692, 700 (La. Ct. App. 2d Cir. 1982); Succession of Mangle, 452 So. 2d 197, 201 (La. Ct. App. 3d Cir. 1984); *see also* Estate of Carter, 4 Cal. Rptr. 3d 490, 499 n.7 (Cal. Ct. App. 2003) (noting that Louisiana imposed a more onerous duty to inform than other jurisdictions).

provide information to a beneficiary, even if he is not required to render an accounting. The trustee of a revocable trust, for example, is only required to account to the settlor.⁴²⁰ The duty to furnish information to the beneficiary, however, exists regardless of whether the trust is revocable or irrevocable.⁴²¹

b. Accounting

The trustee is obligated “to keep and render clear and accurate accounts of the administration of the trust.”⁴²² The trustee must annually render accountings to the beneficiary—or to the settlor in the case of revocable trusts—and must also render an accounting when the trustee leaves his office and when the trust is terminated or revoked.⁴²³ The UTC takes a similar approach, and, as a result, a similar obligation exists in many states.⁴²⁴ Tutors, curators, and succession representatives have comparable accounting obligations in Louisiana. Of course, the trustee might elect to render accountings more frequently,⁴²⁵ or the trust instrument might require him to do so. The trust instrument cannot, however, eliminate or reduce the accounting obligation set forth in the Trust Code.⁴²⁶

As a practical matter, if the trustee fails to render an accounting, the beneficiary might simply ask him to do so before filing suit. If the trustee then fails to render an accounting or renders a deficient accounting, then an action for an accounting is an appropriate and useful preliminary remedy.⁴²⁷ The action for an accounting serves many of the same functions in the trust context that it does in other fiduciary litigation. The demand for accounting can operate like a litmus test, giving the beneficiary the opportunity to gauge the dispositions of the judge, the trustee, and any other parties. It is also a fairly inexpensive, low risk, and quick course of action. The trustee, like some other Louisiana fiduciaries, usually has no

420. LA. REV. STAT. § 9:2088 (2018).

421. *See* *Boyd v. Boyd*, 57 So. 3d 1169, 1177 (La. Ct. App. 1st Cir. 2011).

422. LA. REV. STAT. § 9:2088.

423. *Id.*

424. BOGERT & BOGERT, *supra* note 29, § 963.

425. *See* *Landry v. Blaise, Inc.*, 774 So. 2d 187, 191 (La. Ct. App. 4th Cir. 2000).

426. Edward E. Chase, Jr., *Trusts*, in 11 LOUISIANA CIVIL LAW TREATISE § 14:6, 101 (2d ed. 2018).

427. A court may find that a rendered accounting to the beneficiary is deficient and order a new accounting. *See* *Thomas v. Kneipp*, 986 So. 2d 175, 184 (La. Ct. App. 2d Cir. 2008).

defense to a demand for an accounting because the accounting obligation is mandatory. If the trustee provides a proper accounting, the accounting itself will help provide any necessary evidence of the trustee's malfeasance.⁴²⁸ Sometimes, a trustee refuses to comply with a court order to provide an accounting, or the trustee provides a deficient accounting.⁴²⁹ Failure to render an appropriate accounting pursuant to a court order provides the beneficiary with additional evidence of malfeasance, justifying removal of the trustee and other remedies.⁴³⁰

2. Enjoining a Breach of Trust

A beneficiary may bring an action “[t]o enjoin a trustee from committing a breach of trust.”⁴³¹ As discussed in Section IV.D.2, a court may issue injunctive relief to prevent a trustee from committing a breach of the trust without requiring a showing of irreparable harm. A simple court order prohibiting the trustee from engaging in a particular action may also be sufficient in some cases.

3. Removal of Trustee

Trustees “shall be removed in accordance with the provisions of the trust instrument or by the proper court for sufficient cause.”⁴³² The Trust Code does not elaborate on the meaning of sufficient cause. The Louisiana Trust Estates Law was similarly vague: “For sufficient cause shown, a

428. *E.g.*, *Brown v. Schwegmann*, 861 So. 2d 862, 869–70 (La. Ct. App. 4th Cir. 2003) (accounting documents demonstrated trustee engaged in self-dealing, failed to segregate trust funds, and engaged in other breaches of his fiduciary duty).

429. *E.g.*, *Thomas*, 986 So. 2d at 185 (court found the formal accounting filed by the trustee after being ordered to do so was insufficient); *Bridwell v. Bridwell*, 381 So. 2d 566, 567–88 (La. Ct. App. 2d Cir. 1980) (trustee “failed to comply with the judgment [ordering her to provide an accounting] and contempt proceedings were had resulting in her incarceration.”).

430. *E.g.*, *Boyd v. Boyd*, 57 So. 3d 1169, 1173 (La. Ct. App. 1st Cir. 2011); *Brown*, 990 So. 2d at 1287.

431. LA. REV. STAT. § 9:2221 (2018).

432. *Id.* § 9:1789. Additional grounds exist for removing a corporate trustee. *Id.*

trustee may be removed by the proper court.”⁴³³ In other words, since 1938, the standard for removal of a trustee has been “sufficient cause.”⁴³⁴

a. General Standard and Comparison to Other Laws

Although Louisiana’s trustee removal statute has remained virtually unchanged since 1938, Louisiana appellate courts did not begin to consider the meaning of “sufficient cause” until the 1970s and 1980s.⁴³⁵ Despite their failure to provide any meaningful analysis or citation, it appears that Louisiana courts essentially adopted the position of the First and Second Restatements.⁴³⁶ This reliance is misplaced because it wholly ignores the well-developed bodies of law and jurisprudence in Louisiana related to other fiduciaries.

“Sufficient cause” should be understood by reference to the Trust Code as a whole. It should also be understood by reference to other Louisiana laws regulating fiduciaries, such as tutors, curators, and succession representatives.⁴³⁷ The legislative schemes applicable to tutors, curators, and succession representatives have much in common with the laws governing trustees. All of these legislative schemes contemplate that the fiduciary may be removed through court action if sufficient grounds exist. A curator may be removed by the court for “good cause.”⁴³⁸ Other statutory provisions give various, non-exclusive examples of good cause.⁴³⁹ Similarly, a tutor may be removed if, among other reasons, he “has become disqualified; . . . has become incapable of discharging the duties of his office; has mismanaged the minor’s property; [or] has failed to perform any duty imposed by law or by order of court”⁴⁴⁰ A succession representative may be removed if, among other reasons, he “has become disqualified, has become incapable of discharging the duties

433. LA. REV. STAT. TITLE 9 APP. § 9:1877 (1950). The statute was in effect from 1938.

434. The phrase was likely borrowed from the Restatement (First) of Trusts. *See, e.g.*, *Hagerty v. Clement*, 196 So. 330, 333 (La. 1940) (noting that the Restatement was the basis of the Louisiana Trust Estates Act of 1938).

435. *See, e.g.*, *Succession of Supple*, 274 So. 2d 790 (La. Ct. App. 4th Cir. 1973); *see also* *Succession of Dunham*, 408 So. 2d 888, 901 (La. 1981) (noting that only two other cases had previously dealt with trustee removal: *Supple* and *Holladay*).

436. *Id.*

437. *See, e.g.*, LA. CIV. CODE arts. 12–13 (2018); P. RAY LAMONICA & JERRY G. JONES, LOUISIANA LEGISLATIVE LAW AND PROCEDURE HANDBOOK § 7:7 (2018).

438. LA. CODE CIV. PROC. art. 4568 (2018).

439. LA. REV. STAT. § 9:1025 (2018); LA. CODE CIV. PROC. art. 4566(j).

440. LA. CODE CIV. PROC. art. 4234.

of his office, has mismanaged the estate, has failed to perform any duty imposed by law or by order of court.”⁴⁴¹ Jurisprudence in these areas can help resolve many unanswered questions regarding trustee removal in Louisiana.

Louisiana jurisprudence generally supports the view that a trustee may be removed for similar reasons that allow removal of a succession representative, curator, or tutor. In other words, good cause may exist where: (1) the trustee has become disqualified; (2) the trustee is incapable of discharging his duties; (3) the trustee mismanaged the trust; or (4) the trustee failed to perform any duty imposed by law or by order of the court. The following sections consider each of these grounds for removal.

b. Trustee Has Become Disqualified

Sufficient cause for removal exists if the trustee no longer possesses the requisite statutory requirements for serving as trustee.⁴⁴² For example, a natural person may serve as trustee if he has “full capacity to contract” and “is a citizen . . . of the United States.”⁴⁴³ If a trustee relinquished his citizenship, then removal would be an appropriate remedy.⁴⁴⁴ The phrase “full capacity to contract” should be understood by reference to the Civil Code articles on capacity.⁴⁴⁵ Persons who have reached the age of majority are generally presumed to possess full contractual capacity.⁴⁴⁶ Full interdicts, by definition, lack the requisite capacity.⁴⁴⁷ A limited interdict will usually lack the requisite capacity.⁴⁴⁸ Thus, sufficient cause clearly exists for an interdict’s removal. A trustee might also lose capacity without the necessity of an interdiction proceeding, and removal would be an appropriate course of action.

441. *Id.* art. 3182.

442. Louisiana courts have apparently not considered the issue. This view is supported by the laws governing tutors, curators, and succession representatives. The various Restatements also support this view. *See* RESTATEMENT (FIRST) OF TRUSTS § 107 (AM. LAW INST. 1928); RESTATEMENT (SECOND) OF TRUSTS § 107 (AM. LAW INST. 1953); and RESTATEMENT (THIRD) OF TRUSTS § 32 (AM. LAW INST. 2003).

443. LA. REV. STAT. § 9:1783.

444. For the method by which citizenship may be relinquished, see 8 U.S.C. § 1481 (2018).

445. LA. REV. STAT. § 9:1783.

446. *See* LA. CIV. CODE art. 1918 (2018).

447. *Id.* art. 395.

448. *Id.* art. 396. It is conceivable, but unlikely, that a limited interdict has full contractual capacity, and only matters of personal care are the subject matter of the interdiction.

Disqualification might also be viewed more broadly. A trustee should possess a certain degree of skill, ability, and trustworthiness, and a court should remove a trustee who demonstrates a lack of these qualities. For example, a trustee who is shown to have a history of theft, embezzlement, or other financial impropriety could be removed by a court. Civil Code article 1481 mandates the removal of a trustee who “commits fraud or exercises duress or unduly influences a donor . . . or whose appointment is procured by such means.” As discussed above in connection with succession representatives, a court might remove a trustee on this basis, even if there has not yet been a trial on the merits of fraud, duress, or undue influence. The same is true if there are credible allegations of ingratitude or unworthiness against the trustee.

c. Trustee Is Incapable of Discharging the Duties of His Office

The trustee should be removed if he is incapable of discharging the duties of the office of trustee. Many of the reasons a succession representative might be incapable are applicable in the trust setting. A trustee who lacks sufficient education, training, or business acumen might be incapable of discharging his duties.⁴⁴⁹ A trustee who possessed the requisite skills and abilities might later lose those traits as a result of mental or physical decline, in which case removal would likewise be appropriate.

A practical obstacle might prevent a trustee from being able to administer the trust. The nature of the trust property might, for example, require the attention of a trustee who can be physically present and hands-on in its administration. This would result in a practical obstacle to a trustee who resides far away from the trust property. Additionally, although felony conviction is not an automatic disqualification from serving as trustee, an incarcerated trustee would likely be incapable of discharging the duties of his office as a result of his incarceration.

A conflict of interest may result in a trustee becoming unable to discharge the duties of the office. A conflict is not generally a basis for removal unless it adversely affects the administration of the trust. Louisiana courts are particularly forgiving of trustee conflicts “where the settlor knew of the potential conflict at the time the trust was created and the trustee named.”⁴⁵⁰

449. See *supra* Section III.D.3.

450. Succession of Noe, 398 So. 2d 1173, 1177 (La. Ct. App. 2d Cir. 1981); accord McCaffery v. Lindner, 263 So. 3d 1205, 1210 (La. Ct. App. 5th Cir. 2018).

Quite a few Louisiana cases involve calls for a trustee's removal due to hostility between the trustee and the beneficiary.⁴⁵¹ Hostility is not grounds for removal "unless it materially impairs or interferes with the proper administration of the trust."⁴⁵² Hostility can easily impact the trustee's willingness or ability to fulfill his obligations as trustee. In *Albritton v. Albritton*, the relationship between the trustee and beneficiary, who were father and son, had "deteriorated to the point where they only communicate[d] through their respective attorneys."⁴⁵³ As the court explained: "The hostility and ill will appear deep-seated and in the light of human experience it is difficult if not impossible to believe that Dr. Albritton's actions as trustee will remain unaffected by these emotions."⁴⁵⁴

d. Trustee Has Mismanaged the Trust

The "trustee should be removed if the trust estate is obviously being mismanaged."⁴⁵⁵ Mismanagement can occur in a number of different manners, many of which are similar to mismanagement in other fiduciary settings. Misappropriation of trust funds, imprudent investments, and similar acts of mismanagement are grounds for removal.⁴⁵⁶ *Brown v. Schwegmann* is a helpful example of a trustee who engaged in several acts of mismanagement justifying his removal.⁴⁵⁷ The trustee misappropriated trust funds by allowing them to be diverted for his own personal use.⁴⁵⁸ The trustee failed to invest the trust funds in a prudent manner because he continued to invest all of the funds in a family business when he should have diversified the investment.⁴⁵⁹ The trustee also failed to maintain and render accounts and commingled trust funds in violation of the express provisions of the Louisiana Trust Code.⁴⁶⁰

The trustee is required to administer the trust in accordance with the terms of the trust instrument and applicable law. Failure to do so may constitute mismanagement justifying removal. In *Albritton*, the trustee's

451. *E.g.*, *Thomas v. Kneipp*, 986 So. 2d 175 (La. Ct. App. 2d Cir. 2008).

452. *Noe*, 398 So. 2d at 1177; *accord McCaffery*, 263 So. 3d at 1210; *Thomas*, 986 So. 2d at 187.

453. *Albritton v. Albritton*, 622 So. 2d 709, 714 (La. Ct. App. 1st Cir. 1993).

454. *Id.* at 715.

455. *Succession of Supple*, 274 So. 2d 790, 794 (La. Ct. App. 4th Cir. 1974).

456. *See Albritton*, 622 So. 2d at 715; *Succession of Dunham*, 408 So. 2d 888, 900–01 (La. 1981).

457. *Brown v. Schwegmann*, 861 So. 2d 862, 868 (La. Ct. App. 4th Cir. 2003).

458. *Id.*

459. *Id.*

460. *Id.* at 868–70.

removal was supported by the fact that he obtained an “extension of the trust [that] was in clear contravention of the trust code and the settlor’s wishes.”⁴⁶¹ The trustee is obligated to “administer the trust solely in the interest of the beneficiary”⁴⁶² Failure to do so may also constitute mismanagement.⁴⁶³

e. Trustee Has Failed to Perform Any Duty Imposed by Law, by the Trust Instrument, or by Order of Court

Failure to comply with a court order or failure to perform the various administrative duties imposed on trustees by the Trust Code or by the trust itself may justify removal. In considering the significance of a trustee’s noncompliance with administrative rules and laws, Louisiana courts have reached similar conclusions in the trust setting as in the succession representative setting. Mere technical violations are usually insufficient grounds for removal, particularly if they do not appear to be in bad faith.⁴⁶⁴ Violations coupled with other facts or particularly egregious failures, however, should justify removal.

Simply failing to provide an annual accounting, for example, is not typically grounds for removal.⁴⁶⁵ Failure to render an accounting coupled with other problems, however, may result in removal.⁴⁶⁶ In *Fontenot v. Choppin*, the court held that removal was warranted when the trustee failed to render accountings, refused to permit the beneficiary to inspect the trust records, and failed to distribute income as required by the trust instrument.⁴⁶⁷ Further, the trustee “had failed to collect all of the assets of the Trust and had filed inaccurate income tax returns.”⁴⁶⁸ In *Martin v. Martin*, removal was appropriate where the trustee refused to communicate with the beneficiary, failed to provide accountings, failed to

461. *Albritton*, 622 So. 2d at 715.

462. LA. REV. STAT. § 9:2082 (2018).

463. *See, e.g., Albritton*, 622 So. 2d at 715; *Martinez v. Alto Emps.’ Tr.*, 273 So. 2d 735 (La. Ct. App. 4th Cir. 1972).

464. *In re Edward Wisner Donation*, 150 So. 3d 391, 402 (La. Ct. App. 4th Cir. 2014); *Thomas v. Kneipp*, 986 So. 2d 175, 184 (La. Ct. App. 2d Cir. 2008); *In re Mashburn Marital Trs.*, 951 So. 2d 1136, 1147 (La. Ct. App. 1st Cir. 2006).

465. *See Thomas*, 986 So. 2d at 185.

466. *But see McCaffery v. Lindner*, 262 So. 3d 1205 (La. Ct. App. 5th Cir. 2018) (court did not remove trustee despite her egregious breaches of trust).

467. *Fontenot ex rel. Fontenot v. Choppin*, 836 So. 2d 322, 324–25 (La. Ct. App. 1st Cir. 2002).

468. *Id.*

distribute income as required by trust instrument, and did not allow the beneficiary to inspect records pertaining to the trust.⁴⁶⁹

4. *Compelling a Trustee to Redress a Breach of Trust: Money Damages*

A beneficiary may bring an action “to compel a trustee to redress a breach of trust.”⁴⁷⁰ Redress is usually in the form of money damages, and awards are calculated in a manner similar to that in actions against mandataries and succession representatives. The Trust Code specifies the types of damages or harms for which a trustee may be held accountable: “(1) A loss or depreciation in value of the trust estate resulting from the breach of trust; or (2) A profit made by the trustee through breach of trust; or (3) A profit that would have accrued to the trust estate if there had been no breach of trust.”⁴⁷¹ The provision is based on the Restatement (First) of Trusts,⁴⁷² which notes that the “three types of remedies are not always distinct and are not always all of them available.”⁴⁷³ Again, similar remedies are available against mandataries and succession representatives.

The trustee may be held liable for “a loss or depreciation in value of the trust estate resulting from a breach of trust.”⁴⁷⁴ These damages are essentially measured by the loss in value or by the cost of restoration. Restoration damages are appropriate in a variety of cases, including cases where the trustee appropriates funds for his personal use. In *In re Bradford Trust*, the trustee allowed the settlor to divert funds for purposes not authorized by the trust instrument, including \$4,212.50 for football tickets and vacation expenses.⁴⁷⁵ The Court held that this was a breach of trust and ordered the trustee to repay the funds to the trust.⁴⁷⁶ Similarly, in *McCaffery v. Linder*, the trustee—who was also the income beneficiary—improperly distributed about \$900,000 in principal to herself while she served as trustee, and she was ordered to restore the funds to the trust.⁴⁷⁷

Trustees may also be liable for disgorgement and lost profit damages. The trustee in *In re Bradford Trust* also breached his duties as trustee when

469. *Martin v. Martin*, 663 So. 2d 519 (La. Ct. App. 4th Cir. 1995).

470. LA. REV. STAT. § 9:2221 (2018).

471. *Id.* § 9:2201.

472. LA. REV. STAT. ANN. § 9:2201 Editor’s Note, cmt. b (1964).

473. RESTATEMENT (FIRST) OF TRUSTS § 205 cmt. a (AM. LAW INST. 1928).

474. LA. REV. STAT. § 9:2201.

475. *In re Bradford Tr.*, 538 So. 2d 263, 268–69 (La. 1989).

476. *Id.* (trustee was only ordered to repay two-thirds of the funds because he had settled with one beneficiary).

477. *McCaffery v. Linder*, 263 So. 3d 1205 (La. Ct. App. 5th Cir. 2018).

he sold off stock in Lehman Corporation and then allowed more than \$100,000 of the proceeds to be loaned to another party without any security.⁴⁷⁸ The loan was only repaid—with 7% interest—after suit was instigated. The Court said that repayment with interest was insufficient for measuring damages. Rather, disgorgement of the dividends paid by Lehman after the sale was the appropriate remedy.⁴⁷⁹ Comparable disgorgement damages are clearly allowed against mandataries and ought to also be allowed against succession representatives in appropriate cases.⁴⁸⁰

Finally, the trustee in *Bridwell v. Bridwell* was ordered to pay reimbursement and disgorgement damages after she misappropriated funds from the sale of trust property.⁴⁸¹ The court ordered the trustee to reimburse the trust for the amount of the funds and additionally held her liable “for the income that would have accrued to the trust if the funds had been prudently invested.”⁴⁸² The trustee had apparently placed the trust funds in her personal account, which accrued interest at the rate of 7.5%.⁴⁸³ The court used that number to measure the interest, in effect ordering disgorgement of her profit.⁴⁸⁴

F. Prescription

Although the jurisprudence on this point is generally lacking, actions against trustees ought to be governed by the same basic rules applicable to mandataries and succession representatives. Actions for breach of fiduciary duty, demands for accounting, and similar actions are personal actions subject to a 10-year prescriptive period.

1. Louisiana Revised Statutes § 9:2244: Prescription for Issues Disclosed in an Accounting

If a trustee has rendered an accounting, the Trust Code sets forth a shorter prescriptive period of two or three years. Any “action for damages by a beneficiary against a trustee for any act, omission, or breach of duty” that is disclosed in an accounting is subject to the two- or three-year period

478. *In re Bradford Tr.*, 538 So. 2d at 268–69.

479. *Id.*

480. *See supra* Sections II.D.4 and II.D.5.

481. *Bridwell v. Bridwell*, 381 So. 2d 566, 570 (La. Ct. App. 2d Cir. 1980).

482. *Id.*

483. *Id.*

484. *Id.*

set forth in § 2234 of the Trust Code.⁴⁸⁵ The statute sets forth the mechanics of delivering the accounting and special rules applicable to minors who are beneficiaries.⁴⁸⁶ The prescriptive periods set out in § 2234 “are peremptive periods that are triggered by an accounting rendered and delivered by the trustee.”⁴⁸⁷ Furthermore, “[t]he burden is on the trustee to show when he made an accounting sufficient to trigger the commencement of the time periods.”⁴⁸⁸

2. Louisiana Revised Statutes § 6:1124: One-Year Prescription for Financial Institutions

If a financial institution is acting as trustee or fiduciary, an even shorter prescriptive period may apply. Louisiana Revised Statutes § 6:1124 provides that when a financial institution is acting as trustee or other fiduciary, “[a]ny claim for breach of a fiduciary responsibility of a financial institution or any officer or employee thereof may only be asserted within one year of the first occurrence thereof.”

CONCLUSION

Fiduciary litigation poses many interesting practical and theoretical challenges in Louisiana. Louisiana’s unique legal heritage and the piecemeal revision and enactment of laws has, predictably, resulted in occasional confusion and inconsistency. Courts have understandably struggled to correctly resolve important legal issues. Too often, courts have turned to inappropriate common law sources and methodologies to resolve issues readily addressed by our private civil law system. This Article takes a preliminary step toward creating more cohesive and comprehensive guidance for courts and practitioners in resolving questions relating to fiduciaries in the estate planning setting.

485. LA. REV. STAT. § 9:2234 (2018).

486. *Id.*

487. Succession of Houston, 253 So. 3d 836, 851 (La. Ct. App. 2d Cir. 2018).

488. *Id.*; accord *Boyd v. Boyd*, 57 So. 3d 1169, 1175 (La. Ct. App. 1st Cir. 2011).